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BTAN

A TREATISE

ON THE WRONGS CALLED

SLANDER AND LIBEL,

AND ON

THE REMEDY BY CIVIL ACTION FOR THOSE WRONGS.

By JOHN TOWNSHEND.

SECOND EDITION.

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PREFACE

TO THE SECOND EDITION.

It was my good fortune to be called upon, very much sooner than I had expected, to prepare a second edition of the following essay. For more than a year past the first edition has been what is termed "out of print." The rapid sale of the first edition, and the continual demands for copies, is a gratifying evidence of the favor with which my work has been received, and a sufficient excuse for its republication.

As stated in my former preface: warned by experience of the difficulties in the law regarding defamation, I hoped by means of this essay, to mitigate to the student and the practioner the obstacles to an understanding of the Law of Libel.

While large additions have been made, there are but few modifications of the propositions as originally published; and many propositions for which, in my first edition, no direct authority could be cited, have been since legitimatized by judicial decision.

In preparing this edition, I have had the advantage of the third English edition of Starkie on Slander, by Fol-

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kard, published in 1869; but as the work has not been reproduced in this country, I have throughout made my references to the second American edition of Starkie by Wendell. My references to Holt on Libel are to the American edition.

The devotion of twelve pages of appendix to some cases deemed important and not of easy access, will, it is believed, be generally approved.

As the major part of the additions is contained in the notes, and as the size of the page has been enlarged, the increase in the number of pages (more than 150) but imperfectly indicates the amount of new matter.

Solely for typographical reasons, I have departed from the plan pursued in the first edition of numbering the notes consecutively throughout the volume. The numbering of the sections has been retained to correspond with the first edition. The index has been enlarged, and the whole work has, it is hoped, been improved.

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AN ESSAY ON THE LIBERTY OF THE PRESS, chiefly as it respects personal slander. By Bishop Hayter.

[In Marvin's Legal Bibliography a treatise with a precisely similar title is attributed to John Asgill. I know not if it is the same work.]

"ANOTHER LETTER TO MR. ALMON ON MATTERS OF LIBEL."—"The position that it is not material whether the libel be true or false, or whether the person that made it be of good or ill fame, is a proposition of truth and the provision of a sanctuary for weak and wicked men, who may be employed as ministers or judges."

THE PEOPLE. Dedicated to Sir Francis Burdett, Bart. By an unlettered man. Printed for the Author, and sold by M. Jones, 5 Newgate Street, London. 1811.

[This work professes to contain an analysis of Pitt's system, and to show the great danger of the theory, with regard to libels. To trace that theory to its origin, and that it is directly contrary to the reformed religion and the New Testament.]

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Skene on Crimes. 25th chapter of title 2—Of famous Libels and Seditious Speeches.

Tract on Libel. By Lord Bacon. Mentioned in the memoirs of T. Hollis, p. 169.

[It is referred to in a note to T. Holt White's edition of Milton's Areopagitica, and the annotator adds: "My inquiries after this posthumous publication have been fruitless." Query. If the same tract as one entitled "Certain observations upon a Libel. By Lord Bacon, A. D. 1592," to be found in several editions of Bacon's works.]

Lord Sidmouth's Circular respecting libels.

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[The result of these trials was that both Swift and Burrows found themselves inmates of the same jail. Each for libelling the other. See Barrington's Memoirs.]

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PART I.

THE LAW

OF

SLANDER AND LIBEL.

SLANDER AND LIBEL.

CHAPTER I.

INTRODUCTORY.

Language as a means of effecting injury—Slander—Libel—Defamation—Redress—The Law of Libel—Object in view—Division of subject—Attempts to define Libel.

§ 1. Among the means which one individual may employ to affect another or to affect society in general are sounds and signs.[1] Language, in so far as it is the medium for communicating or exciting ideas, consists of a system of sounds and signs, and is the chief among the sounds and signs which affect individuals or society in general.[2]

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[1] As ringing bells, firing guns, beating drums, clapping hands, hooting, &c., see Martin *v.* Nutkin, 2 P. Wms. 266; Soltan *v.* De Held, 2 Sim. N. S. 133; 16 Jur. 326; First Bap. Ch. *v.* Sch. R. R. Co. 5 Barb. 79; Tarleton *v.* McGawley, Peake's Cas. 205; Moshier *v.* Utica & Sch. R. R. Co., 8 Barb. 427; Cole *v.* Fisher, 11 Mass. 137; Loubz *v.* Hafner, 1 Dev. 185; Gregory *v.* Brunswick, 6 M. and G. 953; Trustees, &c., *v.* Utica, &c., 6 Barb. 313; Davidson *v.* Isham, 1 Stock. 186. Noise of pupils in schools, Com. Dig. Act. on case, c. 294; noise in manufacturing steam boilers, Fish *v.* Dodge, 4 Denio, 311; barking dogs, Brill *v.* Flagler, 23 Wend. 354. In Lansing *v.* Smith, 8 Cow. 146, Sutherland, J., compares the action for a nuisance to an action of slander for words not actionable in themselves.

[2] There is nothing in nature but may be an instrument of mischief (L'd Chief J. Pratt, in Chapman *v.* Pickersgill, 2 Wils. 145).

"A very great part of the mischiefs which vex the world arise from words." (Burke in a letter to his son.) "Among the abounding iniquities of this age, the ini-

Language expressed in sound is oral language or speech. Language expressed in signs is written language, or writ-

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quity of the tongue, that little member, set on fire by hell, is not least. And among the evils of the tongue is there any more pernicious and deadly, and yet more common and epidemical than backbiting and slander? And hence it is, I have been encouraged to engage in this work, which is nothing else but a naked and methodical collection of the remedies prescribed by the law against this malady." (Preface to Sheppard on Slander.)

Words are contained under the general expression of a human act, as also signs which have the same effect with words. (Wood's Civil Law, 28.) A fraudulent representation is in effect a wrongful action (Sharp *v.* Mayor of N. Y. 25 How. Pra. R. 396) *scribere est agere.* (The People *v.* Rathbun, 21 Wend. 509, 540.) On the trial of Algernon Sidney, the prisoner inquired, And is writing an *act?* to which Lord Jefferies replied, Yes it is *agere.*

Language is not the only mode by which reputation may be injured. "Scandal signifies a report or rumor or an *action* whereby one is affronted in public." (Jacob's Law Dict.) Thus, in Brewer *v.* Day, 11 M. and W. 625, one cause of special damage was, that defendants, by causing plaintiff's goods to be seized on an unfounded claim for debt, occasioned his customers to think him insolvent; and in trespass for breaking and entering plaintiff's dwelling, upon false charge of having stolen property concealed therein, *per quod* she was injured in her credit, it was held that the jury might give damages as aggravated by the false charge (Bracegirdle *v.* Orford, 2 Maule and Selw. 77. See Jeffries *v.* Duncombe, 11 East, 226; Spall *v.* Massey, 2 Stark. Cas. 559.) As to injury to reputation by act, see Beaumont *v.* Reeve, 8 Adol. and Ell. 483; and 1 Siderfin, 375, where one Cooper brought an action upon the case against Witham and his wife, for that the wife maliciously intending to marry him, did often affirm that she was sole and unmarried, and importuned *et strenue inquisivit* the plaintiff to marry her; to which affirmation he gave credit, and married her, when *in acto* she was wife of the defendant; so that the plaintiff was much troubled in mind, and put to great charges, and damnified in his reputation. He had a verdict, but no judgment; for by Twisden, J., the action lies not, because the thing here done is felony; no more than if a servant be killed, the master cannot have an action *per quod servitium amisit, quod curia concessit;* see also Vidian's Entries, where is a form of declaration for saying: Regard brothers went to a house which was a brothel and ought to be torn down, special damage that the house was torn down. As to defamation by deed, see Of Libels: An Institute of the Laws of England, by Thomas Wood, LL. D., 1720. Where a banker having sufficient funds in hand belonging to his customer, dishonors that customer's check, he is liable to an action for damages. (Robinson *v.* Marchant, 7 Q. B. 918; and see Marzetti *v.* Williams, 1 B. & A. 415.) And where a notary protested a note for non-payment, without having previously presented the note to and demanded payment of the maker, he was held liable in an action for the damage thereby occasioned to the reputation of the maker (MS.)

Language, however licentious and abusive, is not a trespass (Adams *v.* Rivers, 11 Barb. 397), but may constitute an imprisonment (Homer *v.* Battyn, Buller's N. P. 62; Pike *v.* Hanson, 9 N. H. Rep. 491); and cruelty (Durant *v.* Durant, 1 Hagg. Ecc. R. 769; Lockwood *v.* Lockwood, 2 Curteis' Ecc. R. 281, cited and approved Bihin *v.* Bihin, 17 Abb. Pr. Rep. 26). A recognizance to keep the peace is not forfeited by re-

ing and effigy. By writing[1] is intended to be understood, every means of symbolizing language by alphabetic characters, with every kind of implement, as pen, pencil, graver, type; with every kind of pigment, as ink, lead, chalk; on any kind of substance, as paper, parchment, linen, wood, copper, steel, stone, or on any wall or post.[2] And by effigy being intended to be understood every other means of communicating or exciting ideas other than by speech or by writing. Effigy, therefore, includes pictures, statues, gestures.

§ 2. The effect of language may be beneficial or injurious. If injurious, the injury *may* amount to a wrong, entitling the party wronged to redress by law. The designations of the wrong and of its remedy and of the wrong doer differ according to the means employed to effect the wrong.

§ 3. One may be so injuriously affected by speech as to be what is termed slandered; and, in that event, the speech so affecting him is called slander[3] or a slander, and the speaker is denominated a slanderer.

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proachful words (4 Bl. Com. ch. xviii). As to speech being the foundation of a criminal prosecution, see 2 Bishop on Crim. Law, § 813.

If a man menaces my tenants at will, of life and member, *per quod* they depart from their tenures, an action upon the case will lie against him, but the threatening without their departure is no cause of action. (9 H. 7, 8, Vin. Ab. Actions Case, N. c. 21.)

Action lies for threatening workmen to maim and prosecute them, whereby the master lost the selling of his goods, the men not daring to go on with their work. (Garret *v.* Taylor, Cro. J. 567 pl. 4, A. D. 1621; Skinner *v.* Kitch, Law Rep. 2 Q. B. 393; see, however, Ashley *v.* Harrison, 1 Esp. 48 and *post*, § 201.)

[1] Writing includes printing (Saunderson *v.* Jackson, 2 Bos. and Pul. 238; Hen shaw *v.* Foster, Pick. 318) and marks with a lead pencil (Geary *v.* Physic, 5 B. and C. 238; Classon *v.* Bailey, 14 Johns. 484). See Bouvier's Law Dict. tit. Effigy.

[2] Austin *v.* Culpepper, Skin. 123, Show. 314.

[3] Slander is defaming a man in his reputation by speaking or writing words which affect his life, office or trade; or which tend to his loss of preferment in mar-

§ 4. One may be so injuriously affected by writing or effigy as to be what is termed libeled; and, in that event, the writing or effigy so affecting him is called libel or a libel, and he who puts forth such writing or effigy (the publisher or venter) is denominated a libeler,[1] "one whose

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riage or service, or to his disinheritance, or which occasion any particular damage. (Introduction to the Law relative to trials at *Nisi Prius*. By a Learned Judge [Lord Bathurst]. Vol. I, p. 3.)

Slander is the imputation: 1. Of some *temporal* offence for which the party might be indicted and punished in the temporal courts. 2. Of an existing contagious disorder, tending to exclude the party from society. 3. An unfitness to perform an office or employment of profit, or want of integrity in an office of honor. 4. Words prejudicing a person in his lucrative—possession [profession], or trade. 5. Any untrue words occasioning actual damage. (1 Hilliard on Torts, ch. vii. § 3.)

Slander is defined to be "the publishing of words in *writing, or by speaking*, by reason of which the person to whom they relate becomes liable to suffer some corporeal punishment, or to sustain some damage." (Bac. Abr.)

"Slander being an unwritten or unprinted libel, and libel a written or printed slander." (1 Hilliard on Torts, ch. vii. § 2.)

The word slander, as used in former times, seems to have had a meaning different to that in which it is now used. Thus: "But because some are wrongfully slandered (*accused*), King Henry I ordained that none should be arrested or imprisoned for a slander (*accusation*) of mortal offence, before he was thereof indicted by the oaths of honest men before those who had authority to take such indictments." (Mirrour of Justices, ch. xi, § 22.) "In this same year the mysseles (lepers) thorow-oute Cristendom were *slaundered* that they had made covenant with Sarasenes for to poison all Christen men." (Capgrave's Chronicle of England, p. 186.)

In a document addressed by the Dean and Chapter of Aberdeen to Bishop Gordon, dated January 5, 1558, is the following:

"*Imprimis*, that my Lord Bishop cause the kirkmen within his diocie to reform themselves in all their *slanderous* manner of living, and to remove their open concubines, as well great as small. *Secundo*, that his Lordship will be so good as to show edificative example—in special in removing and discharging himself of the company of the gentlewomau by whom he is greatly *slandered;* without the which be done, diverse that are partners say they cannot accept counsel and correction of him which will not correct himself," &c., &c.—Reg. Aberd., lxi.

If any *slanderously* charge another with any false crime (Ridley's Civil Law, 31); and in the Statute, 3 Edw. I, ch. xxxiv, none are to publish false news whereby *slander* may grow betweeen the king and his people.

Mis-say, to slander, to speak ill. (Spencer.)

"I would not, * *
Have you so *slander* any moment's leisure
As to give words or talk with the Lord Hamlet." (Shakespeare.)

[1] "Libeler—he who shall, to the infamy of another, write, compose, or publish a book, song, or fable, or maliciously procure any of those acts to be done, is guilty of a *libel*." (Just. Inst.)

heart is more dark and base than that of an assassin, or than his who commits a midnight arson."[1]

§ 5. So, too, formerly in England, one might be so injuriously affected by language, whether in the form of speech, writing, or effigy, as to be what was termed defamed;[2] in which event the language so affecting him was called defamation, and he from whom the language proceeded was denominated a defamer.

§ 6. Again, by means of language may be effected a wrong, termed "a malicious prosecution," as also the wrong, termed "slander of title." Neither to the authors of these wrongs nor to the parties affected has any descriptive appellation been assigned.

§ 7. Besides slander, libel, defamation, malicious prosecution and slander of title, language is the means by

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"The distinction between the satirist and the libeler is, that the one speaks of the species, the other of the individual; the one holds the glass to thousands in their closets, that they may contemplate the deformity, and thereby endeavor to reduce it, and thus by private mortification avoid public shame. Thus the satirist privately corrects the fault, like a parent, while the libeler mangles the individual like an executioner." (Joseph Andrews, vol. II, p. 5.)

"And indeed there is not in the world a greater error than that which fools are apt to fall into, and knaves with good reason, to encourage, the mistaking a satirist for a libeler." (Pope, Anon. Satires and Epistles—Advertisement.)

"The early English satirists were mighty in their vocation against the lawyers, the regular and secular clergy, and the more eminent professors. The political ballad-mongers aimed higher. They stoutly supported Simon de Montfort against Henry the Third. This support was probably the occasion for the statute of 1275, 'against slanderous reports or tales to cause discord betwixt king and people.'" (See The Barons' War, &c., by W. H. Blaauw, M. A.; The Miracles of Simon de Montfort, Camden Soc. Pub.)

A Barrator is a mover of suits and quarrels in courts * * * * * by spreading false rumors and reports to raise discord among neighbors. (1 Coke's Inst. 368.) Lampooner, see 3 Lev. 248.

[1] Oswald's Case, 1 Dall. 329.

[2] *Defamed* seems formerly to have been used in the sense of charged, thus in the forms of indictment referred to in "The Mirrour of Justices," we find it so used; as

which may be effected, at least in England, the offences called treason,[1] heresy, sedition, blasphemy, profanity, scandalum magnatum, calumny, scolding, brawling, menaces, deceit, perjury, and many more.[2]

§ 8. Slander is a private wrong or tort, cognizable by the common law, the remedy for which is a civil action formerly known as an "action on the case for words," and now as an action or the action of or for slander.[3]

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thus: "I say, Sebourge there is *defamed* by good people of the sin of heresy," &c., and in Lord Somers' Tract on Grand Juries, "the constitution intrusts such inquisitions in the hands of persons of understanding * * * that might suffer no man to be falsely accused or *defamed*." "Thieves openly defamed and known." (4 Bl. Com. ch. xxii.) "There is a *fame* against Mr. Spencer for not burying Edward Merrick as a Christian ought to be." (Calendar of State Papers, Domestic Series, of the reign of Charles I, 1633–1634. Edited by John Bruce.)

"To diffame is, as Bartol saith, to utter reproachful speeches of another with an intent to raise up an ill fame of him and therefore himself expresseth the act itself in these words: *Diffamare est in mala fama ponere.* Albeit diffamations properly consist in words, yet may they also be done by writing, as by diffamatory libels, and also by deeds as by signs and gestures of reproach, for these no less show the malicious mind of the diffamer than words do." (Ridley's Civil Law, 339.)

[1] In the United States there must be some overt act to constitute the act of treason. (Bouvier's Law Dict. tit. Treason.)

[2] Scolding often repeated to the disturbance of the neighborhood makes it a nuisance, always punishable at the leet and therefore indictable. (The Queen *v.* Foxby, 6 Mod. 145.) As to Brawling, see Stephen's Ecclesiastical Statutes, p. 336, and copious notes; and see Jacob's Law Dict. tit. Cuckinstool. In Denmark there was a species of libel called Bersöglisvisur or free-speaking song. When King Magnus (say about A. D. 1040) gave dissatisfaction to his subjects, a meeting was held at which lots were drawn as to which one of those assembled should address one of these songs to the King. See Det Norske Folkes Historie, 3 vols., Christiania, 1852–5; also Den Danske Erobring of England og Normandiet, Copenhagen, 1863, and North British Review, Nov., 1863.

[3] Slander is not like libel, an indictable offence. (Bailey *v.* Dean, 5 Barb. 297.) Nor is a single precedent of any criminal proceeding for unwritten imputations upon the characters of individuals to be found, except in cases of high treason, * * and it must have been as constituting rather an offence against the government, than an injury to the individual, and being therefore seditious that words reflecting on a magistrate in the immediate execution of his office were for the first time in the reign of Queen Anne held to be indictable. (Reg. *v.* Langley, 2 Ld. Raym. 1060; Holt R. 654.) But I am not aware that Mr. Starkie has adverted to this case, or to the doctrine which is laid down in it. (1 Mence on Libel, 90.)

§ 9. Libel is both a public wrong or crime and a private wrong or tort, cognizable by the common law. The remedy for the public wrong is by indictment or criminal information. The remedy for the private wrong is a civil action, now known as an action or the action of or for libel.

§ 10. Defamation was an ecclesiastical offence, cognizable only in the ecclesiastical courts, by a proceeding in such courts.[1]

§ 11. The redress sought in the actions of slander and libel is a pecuniary compensation called damages for the injury sustained by the party complaining, to be recovered against the party complained against, and is intended solely for the benefit of the complainant;[2] on the other hand, the proceeding in the ecclesiastical court was in theory at least, one solely for the benefit of the party complained against. It was to awaken him to a sense of the sin he had committed, and cause him to do penance therefor *pro salute animæ*. In a proceeding for defamation no damages were nor could be awarded to the party defamed. The defamer might be censured, compelled to recant the defamation, to perform penance and pay costs, and for disobedience to the court's decree be excommunicated. Beyond this the ecclesiastical court had no power.[3]

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[1] Suits in ecclesiastical courts for defamation were abolished by statutes 18 & 19 Vict. ch. xli.

[2] "Action for slander is to recover damages for *words spoken* of a person who is thereby injured in his reputation, and for *words spoken* of a person which affect his life, office, profession, or trade, or which tend to his loss, or occasion any particular or special damage to him." (Onslow *v.* Horne, 3 Wilson, 177.)

[3] The ecclesiastical law is part of the English common law. (Reg. *v.* Millis, 10 Cl. and F. 534, 671; and see Catterall *v.* Catterall, 1 Robertson, 580; Bishop on Marriage and Divorce, § 9.) But has no status in the State of New York. (Young *v.* Ransom, 31 Barb. 49, 60.)

The power of the ecclesiastical court is the infliction of penance *pro salute animæ* and awarding costs, but not damages. (4 Co. 20, 2 Inst. 492.) The sentence of an

§ 12. The law applicable to the wrongs here termed slander and libel is sometimes designated the law of libel; sometimes the law of defamation; and sometimes the law of slander and libel. For no better reason than that it is the one most in use we shall adopt the term law of libel.

§ 13. The term law of libel, as generally understood, comprises the law as applicable to nearly all the wrongs of which may be effected by means of language. Our purpose, however, is not to consider the whole of the law of libel so understood, but so much of it only as applies to slander and to libel as a private wrong.

§ 14. As it is *sometimes* only that words which affect another amount to a wrong, we propose to ascertain, if we can, what are the rules by which to test in any particular instance of words affecting another, whether they do or do not constitute a wrong, what kind of wrong, and what is its appropriate remedy. In the execution of this purpose we desire not merely to collect, epitomize and classify under appropriate titles the reported adjudications, but to probe the subject to its core and unfold the principles which it involves; to show not only what has been decided, but the principles of those decisions: to lay down, if we can, such rules as will enable one under any given state of circumstances to determine when a wrong, as slander or libel, has occurred, when a remedy may properly be sought and how it may be pursued and obtained.

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ecclesiastical court in a proceeding for defamation has its counterpart in the Scotch Law under the name of *Palinode*.

As to suits in spiritual or ecclesiastical courts they are for the reformation of manners or for punishing of heresy; *defamation*, laying violent hands on a clerk and the like. * * * Things that properly belong to these jurisdictions are matrimonial and testamentary and defamatory words for which no action lies at law, as for calling one adulterer, fornicator, usurer, or the like. (Jacob's Law Dict., tit. Courts Ecclesiastical.) The courts of Piepowder had jurisdiction of certain actions for slander. (Jacob's Law Dict., tit. Court of Piepowders.)

To accomplish this aim we shall advert to some elementary principles, the relevancy of which may not at once be apparent, but the reason for which will be observed as we proceed, and without a reference to which we should in vain attempt to make ourselves or our subject understood.

§ 15. A thorough investigation into elementary principles seems peculiarly necessary in treating on the law of libel, because it is a branch of the law in which, perhaps, more than any other, principles have, from various causes, been most subject to perversion by undue influences, have been less scientifically treated and more superficially considered. The law of libel has been denounced as vague, fluctuating and incomprehensible. Of the decisions on the subject many are conflicting, more are scarcely reconcilable, and the reasoning in support of all is, with very few exceptions, more or less weak, obscure, and unsatisfactory. It has almost been claimed or conceded that there is something so subtle in the principles of the law of libel as to elude detection, and the law of libel has come to be regarded as a parasitical growth on the main body of the law, presenting features so exceptional as to render inapplicable those general principles which govern other branches of legal science.[1] It will be our endeavor to show that properly understood there is nothing exceptional in the wrongs called slander and libel, nor in the legal principles applicable to these wrongs, that these wrongs are governed by the same principles which apply to all other wrongs, and that there is nothing in the law of libel itself which should render it less easy to comprehend than any other division of jurisprudence.

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[1] A noted peculiarity of the law of libel is its vagueness and uncertainty. (Encyc. Brit., voce Libel.) Holt, writing in 1816, says: "It is indeed in the very nature of the subject (The Law of Libel) that it is extremely difficult to clear it of those popular conceits and of that vagueness of generality which adhere to it as a question of political discussion. (Holt on Libel, Preface.)

§ 16. While profoundly sensible of the difficulty properly to execute this, our self-imposed task, and of our comparative inability to do justice to the subject, we nevertheless flatter ourselves that we shall be able to lay before our readers a more systematic outline of the principles of the law of libel than any which has hitherto been offered or attempted.[1]

§ 17. Chief among the difficulties to be encountered is the combating many of the existing theories and ideas on the subject, most of them coming down to us with the prestige of high authority, hallowed by time and all of them received for law. We esteem it an error and a misfortune that among text writers on legal subjects there has been such a reverence for precedent, such an unquestioned following the one of the other,[2] so little attempt at enlarged and connected views of their subjects in their principles untrammeled by precedent, rendering text books collections of materials for essays rather than essays. For ourselves, we brave being deemed presumptuous, in the hope that we may be useful, and where, after the many years of patient reflection we have bestowed upon our subject, we have arrived at any conclusion which conflicts with existing ideas or decisions, we shall be deter-

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[1] "Though I could not be ignorant either of the difficulty of the matter which he that taketh in hand shall soon find, or much less of my own inability, which I had continual sense and feeling of, yet because I had more means of absolution than the younger sort, and more leisure than the greater sort, I did think it not impossible to work some profitable effect, the rather because where an inferior wit is bent and conversant upon one subject, he shall many times, with patience and meditation, dissolve and undo many knots, which a greater wit, distracted with many matters, would rather cut in two than unknit; and at the least, if my invention or judgment be too barren or too weak, yet, by the benefit of other arts, I did hope to dispose or digest the authorities and opinions * * . in such order and method, as they should take light one from another, though they took no light from me." (Bacon's Introduction to his Reading on the Statute of Uses.)

[2] Making new books, as apothecaries make new mixtures by pouring only out of one vessel into another. Burton, repeated by Sterne.

red neither by the antiquity of the precedent, nor the high position of its author, nor its indorsers, from expressing our dissent. Besides a general and connected view of the subject, we shall study to present a faithful record of all the adjudged decisions and dicta, and as we really have no pet theory to maintain, and are influenced solely by the desire to elicit the true principles on which the law concerning our subject is based, we shall be especially careful throughout to distinguish from received authorities what are merely our inferences or suggestions; and we promise our readers most religiously to abstain from any intentional garbling of authority, or the willful withholding of any decision or dictum in order to support any particular view or theory. The meager attempts heretofore made to reduce the subject into any systematic form will oblige us, to a considerable extent, to treat the subject as *res nova.*

§ 18. We have divided our subject into two principal divisions—slander and libel. Slander and libel have this in common, that each may be, and usually is, effected by means of language. As we have described them, their distinguishing feature of difference is, that the one is effected by oral language, the other by written language. To language in writing is attributed in *most* cases a greater capacity for injury than is attributed to language spoken or speech, so that language which, if spoken, gives no right to redress, may, if reduced to writing, give a cause of action.[1] It is proper to say that the broad distinction

[1] A distinction was very early taken in the Roman law between slander spoken and written, and the *injuria verbalis* was deemed to constitute a much lower degree of injury than the *malum carmen* and *famosus libellus.* (Holt on Libel, 21.) Holt wrote in 1816. He says, p. 225: "It has *lately* become a question whether there be any difference between written and unwritten slander;" and then he refers to Bradley *v.* Methuen, 2 Ford's MS. 78, in which Lord Hardwicke is reported to have said that courts do make a distinction "between words written and bare words."

we have drawn between slander and libel is not one universally adopted;[1] indeed it is not the one, in our judgment, the most logically correct; but we adopt it partly in

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In Thorley's case, 4 Taunt. 355, the question was, Whether an action would lie for words *written*, when such action would not lie for them if *spoken?* "For myself," said Chief Justice Mansfield, "I cannot, upon principle, make any difference between words written (as to the right which arises out of them to bring an action) and words spoken; but the difference has been recognized by the courts for at least a century backwards, and has been established by Lords Hardwicke, Hale, Holt, and others."

This species of defamation [libel] is usually called *written scandal*, and hereby receives an aggravation in that it is presumed to have been entered upon with coolness and deliberation, and to continue longer, and to propagate wider and farther than any other scandal. (Bac. Abr.)

The distinction between *verbal* and *written slander* proceeds upon the principle that words are often spoken in heat upon sudden provocations, and are fleeting and soon forgotten, and therefore less likely to be permanently injurious; while written slander is more deliberate and malicious, more capable of circulation in distant places, and consequently more likely to be permanently injurious. (1 Chit. Gen. Pr. 45.)

The *great distinction* between libel and slander is, "that from a libel damage is always implied by law, whereas some kinds of slander only are actionable without proof of special damage." (Broom's Comm. p. 513 [762].)

Words written and published may be actionable which, if spoken, would not be so without special damage. But they must be such as, in the common estimation of mankind, are calculated to reflect shame and disgrace upon the person concerning whom they are written, or hold him up as an object of hatred, ridicule and contempt. (Fonville *v.* Nease, Dudley, S. C. 303.) As to what is libelous, and as to the distinction between libel and slander. (Rice *v.* Simmons, 2 Harring. 417; Layton *v.* Harris, 3 Harring. 406.) *Vox emissa volet, litera scripta manet.* (Beebe *v.* Bank of N. Y., 1 Johns. 529, 571.)

There was something superstitious in the horror with which the Icelanders regarded a libel, and no offence among them was more surely or bloodily avenged than the publication of satirical verses, or the setting up of a *Nid*—that is, an insulting or indecent figure, or a horse's head on a pole on the lands of another. (See "The Story of Burnt Njal; or, Life in Iceland at the End of the Tenth Century." By George W. Dasent, D. C. S.) It is a marked trait in the character of the Russian people to "feel corporeal punishment less sensibly than a verbal insult. This idea has a religious foundation; a good Christian cannot admit that the punishment of fustigation which has been inflicted on the Saviour of humanity can be for a man a stain of infamy; he believes that a verbal insult affects the immortal part of man, whereas a blow only produces suffering in the least noble part of his being." (*Essai sur l'Histoire de la Civilization en Russie. Par Nicolas de Gerebtzoff.* Paris, 1858, vol. II, p. 575. Westminster Review, January, 1864—Art. Russia.)

[1] It does not apply to the wrong called slander of title, nor to language affecting one in his calling or office, nor to proceedings in the ecclesiastical courts. As to this last, see Ware *v.* Johnson, 2 Sir Geo. Lee's Cases in Eccles. Courts, 103. Holt

deference to a very prevalent use of the terms slander and libel, to distinguish between an injury by speech and an injury by writing, and partly because by this arrangement one word suffices to denote to which particular branch of the subject we refer. In our opinion, the more logical arrangement would be to take slander or defamation as the generic term, and then indicate the division by the epithets oral and written. There are, however, objections to this division—among others, that it omits effigy. Another mode of dividing the subject is to take libel for the generic term, and then distinguish the kind by the epithets defamatory, seditious, &c.[1] This is objectionable on

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says, p. 211: "It is evident, moreover, from the authorities, that words written of a man tending to disparage him in his profession will support an action, although the same words when spoken will not;" and he refers to King *v.* Lake, Hardres, 471; but that case does not authorize any such doctrine.

[1] Blackstone speaks of blasphemous, immoral, treasonable, schismatical, seditious or scandalous libels. (4 Bl. Comm. ch. xi.) And Lord Bolingbroke, writing to Queen Anne, Oct. 17th, 1711, says: "I have discovered the author of another *scandalous libel*, who will be in custody this afternoon; he will make the thirteenth I have seized and the fifteenth I have found out." In Borthwick on Libel, 25, note, it is said: His Lordship seems to have retained the adjective [infamous] in reference to the usual meaning of the word *libel*, when not qualified, in the law of Scotland, which is the same [meaning] as it still has in the spiritual courts of England. It would appear, however, that, even in the courts of common law in England, there was formerly some doubt whether *libel*, or *libellus*, by itself, was the proper technical expression. This we learn from a note (a. p. 4) in the "Digest of the Law Concerning Libels." "Lord Chief Justice Raymond," says the author, "in Curl's case, said that he did not think that *libellus* was always to be taken as a technical word, and asked whether action would lie *de quodam libello intitulat*—the New Testament—and whether the spiritual court did not proceed upon a libel? Mr. Justice Fortescue said a libel was a technical word at *common law*. Mr. Justice Reynolds said that *libellus did not, ex vi termini, import defamation*, but was to be governed by the epithet added to it." (2 Stra. 791.)

In Thorley's case, 4 Taunt. 355, the expression "written and unwritten slander" is used.

Mr. Heard, in his treatise on libel and slander, § 8, uses the phrase "actionable libel." This implies that there may be a libel which is not actionable. He also uses the phrase printed libel. In the index to the same treatise is the phrase "ironical libel."

The *Encyclopædia Britannica, voce* Libel, uses the phrase "defamatory libel;" and the statute, 6 and 7 Vict., ch. xcvi, uses the term "defamatory words and libel" in lieu of "slander and libel."

many grounds. Upon the whole, we conclude that the division we have adopted will be found obnoxious to as few objections, and be more convenient, than any other we could have selected. In describing the matter of a slander or libel—that is, the speech or writing which may or may not constitute a slander or a libel, but which is charged to be a slander or a libel—we shall designate it speech or writing, as the matter of slander or libel may be intended; but generally, and where both slander and libel are used, shall employ the term language or defamatory matter. Neither judges, advocates, nor text writers confine themselves to the terms slander and libel, but employ the terms libel, slander, scandal, calumny, defamation, detraction, verbal injury, and some others, without any accord as to, and with very little regard for, their definitions or connotations. We shall confine ourselves throughout to the terms slander and libel, and employ them as distinct terms and as marking the division between an offence by means of speech and an offence by means of writing or effigy; but in using the phrase *law of libel*, we desire, nothing being said to the contrary, to be understood as meaning and including as well the law applicable to what we call slander as to what we call libel.

"The high court of the Paris Parliament commenced a prosecution against him for *libelous defamation*." (Westminster Review, July, 1860; Art. The French Press, page 118, Am. Reprint.)

"Mr. J. Mackenzie's Narrative, *a false libel*, a defence of Mr. G. Walker, &c., 1690," is the title of a pamphlet published in 1690. And the phrase "*false slander*" is used; Finch's Law, 185.

In an ordinance agreed to by both Houses of the English Parliament, 30th September, 1647, the word *libel* seems to be used in the sense of a book or pamphlet. The ordinance runs thus: "That what person so ever shall make, write, print, publish, sell or utter any book, pamphlet, treatise, ballad, *libel*, or sheet of news whatsoever, or cause so to be done, except the same be licensed by both or either House of Parliament," &c. The word *libel* cannot here mean a defamatory publication, as it is not to be supposed the Parliament would in any case license a defamatory publication.

Sometimes any unfair statement is called a libel, and we say it is a libel on humanity, on the goodness of God, &c.

§ 19. From some cause—perhaps from the fact that language in writing may amount to a public wrong—it has happened that the wrong occasioned by writing (libel) has occupied a larger share of attention than has the wrong occasioned by speech (slander).[1] Whether this is sufficient to account for the circumstance or not, these facts result, that while it is common to speak of the law of libel, it is quite uncommon to speak of the law of slander; and while ingenuity has been tortured to frame a definition of libel or a libel, scarcely any attempts have been made to frame a definition of slander or a slander.

§ 20. The attempts which have been made to define *libel* or *a libel* are so many as to be almost innumerable, yet they have in reality been unavailing; no definition, properly so called, of libel or a libel exists.[2] The

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"The phrase, 'action *for words*,' might seem to be always, as it generally is, employed by the English lawyers, in reference alone to words *spoken*. This, however, is not the case. Thus, Mr. Tomlins, in his Law Dictionary (*voce* Action II. § 1), says: 'Action on the case *for words*; which is brought for words spoken or *written*.' This passage may be remarked as another instance of the varied meaning of legal phrases." (Borthwick on Libel, 22, note.)

[1] Notwithstanding we observe that "A Book of Entries, by W. B.," A. D. 1671, contains eighteen precedents of declarations for slander and not one for libel—"The English Pleader," A. D. 1734, contains several declarations in slander, but not one in libel.

[2] "It is to be observed that no correct, no logical definition of a libel has ever been given." (George on Libel, 14.)

Lord Lyndhurst, in answer to the question, how far it was possible to define the law of libel, said: "It is a subject to which I have paid considerable attention, but I must freely own without any success whatever. I hold it to be hardly possible to define libels by which guilt may be incurred as tending to a breach of the peace, to other proceedings of a violent nature, * * and to a variety of other heads. * * * * Any definitions that I have ever seen given had one or other of two faults, * * * they were either so vague as not to specify or define anything, or * * they were only rendered particular and definite by omitting some species of libel * * * which ought to have been comprehended. * * * I have never yet seen, or been able myself to hit upon anything like a definition of libel * * which possessed the requisites of a

term libel being connotative, its definition to be complete should unfold the whole meaning it involves, the whole of what is connoted; should "select from among the whole of its properties those which shall be understood to be designated and declared by its name;" "those which unfold its nature, which are peculiar to it and which are not found in a like combination elsewhere." This describes a *real definition* of the kind, called *essential*, and before we can frame such a definition, we must know all the properties of our subject, and then select those proper for the purpose. As a libel comprehends a complex aggregate of particulars, either not all known or not all agreed upon, it may be impossible to circumscribe them by a correct and compact general description.

§ 21. The definitions which have been attempted have been framed as supposed standards by which to determine of any given proposition whether or not it constitutes a libel; and experience demonstrating the total worthlessness for any practical purposes of these *supposed* definitions, it has come to be taken for granted, at least by some, that there is that inherent in the subject which prevents the possibility of its definition. This, although imputed to libel as a peculiarity, is not so in fact, the like difficulty attaches to many other terms, and particularly to every other wrong. An attempt to frame a concise,

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definition, and I cannot help thinking that the difficulty is not accidental, but essentially inherent in the nature of the subject. * * * The Latin of libel is not *libellus* but *libellus famosus*. * * Libel then means, in its original, not "little book" but "a defamatory little book." * * * Libel is an offence of a somewhat vague description, but sufficiently known in law, and, perhaps, as well defined as assaults and some others; and I do not believe, from all the experience I have had, that in practice any considerable difficulty is felt on account of its indistinctness." (Report of House of Lords on Defamation and Libel, July, 1843.)

At Rome, the cards of the races, with the names and colors of the riders and drivers, were called *libelli*.

real, essential definition of any other wrong, will disclose the like difficulties as occur in the case of libel.[1]

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[1] As Cousin said, when asked to state in a single sentence the spirit of German philosophy, "These things do not sum themselves up in single sentences."

We subjoin some specimens of the attempts to define libel:

In Wasson *v.* Walter, see in note to § 219, *post*, the plaintiff, a barrister, gave the following neat designation of libel—"Defamation without legal excuse." We esteem this as the most successful among the many attempts to define libel. (See § 50, *post.*)

It is not infamous matter or words which make a libel; for, if a man speak such words, unless they are *written*, he is not guilty of the making of a libel; *writing is of the essence of a libel.* (Ld. Raym. 416.) In order to constitute a *libel*, the subject-matter complained of must be a subject of visible perception. But, provided only it be an object of visible perception, a libel does not appear to be confined to any particular form or shape. By the requisite, which is essential to the existence of a libel, that it be an object of visible perception, *libel* is distinguished from what is technically called *defamation or spoken slander.* Again: "The words most nearly synonymous to the word *libeling*, are *defaming, disparaging, aspersing, slandering.*" (George on Libel, pp. 35, 36, 41.)

"A libel is a contumely or reproach, published to the defamation of the government, of a magistrate, or of a private person." (Comyn's Digest.)

A libel is a malicious *publication*, tending to the disrepute of an individual, the breach of the peace, the seditious violation of the good order of government. (Capel Loft's Essay on Libels, edit. 1785, p. 6.)

The American Encyclopedia, *voce* Libel, refers to the following definition of libel as the best definition: "A libel is any published defamation." And the same article states the difference between libel and slander to consist in this, that libel is published defamation, and slander is spoken defamation.

Written defamation is otherwise termed libel, and oral defamation slander. (Burrell's Law Dict.)

Defamatory words, written and published, constitute a libel. (Maunder.)

Libel, a word which has many different meanings, but is chiefly known in this country as the name of a department of the law, which, from incidental circumstances, has come to include the naturally distinct heads of written slander, sedition, and outrage against religion. (Encyc. Brit. *voce* Libel.)

A libel has been *usually* treated of as scandal, written or expressed by symbols. Libel may be said to be a technical word, deriving its meaning rather from its use than its etymology. (Russell's Treatise of Crimes and Misdemeanors, edit. 1819, p. 308.)

In a strict sense it [libel] is taken for a malicious defamation, expressed either in printing or writing; in a larger sense, the notion of libel may be applied to any defamation whatsoever, expressed either by signs or pictures, as by affixing up a gallows at a man's door, or by painting him in a shameful and ignominious manner. (Hawkins' Pl. Cr.)

Libel, a criminous report of any man cast abroad or otherwise unlawfully published in writing, but then, for difference sake, it is called an infamous libel—*famosus libellus.* (Minshœi: A Guide into the Tongues, &c. London, 1627.)

Written or printed slanders are libels. (Bouvier.)

§ 22. It is rare, indeed, that we can frame a real, essential definition, but by a definition is sometimes understood such an explanation of a given term as

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"All publications injurious to private character or credit of another are libellous." (Addison on Wrongs, referred to as a good definition: McNally *v.* Oldham, 8 Law Times, Rep. N. S. 604.)

"A libel is anything of which any one thinks proper to complain." (Essay prefixed to report of Finnerty's Trial; supposed to be from Jeremy Bentham's Writings.) It is also quoted thus: "A libel is anything published upon any matter of anybody, which any one was pleased to dislike." Attributed to Bentham, cited in pamphlet—Trial of David Lee Child.

A libel is a censorius or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals. (*Per* Hamilton, arg. People *v.* Crosswell, 3 Johns. C. 354; adopted Steele *v.* Southwick, 9 Johns. 214; Cooper *v.* Greeley, 1 Den. 347.)

A libel is a malicious publication in printing, writing, signs, or pictures, imputing to another something which has a tendency to injure his reputation; to disgrace or to degrade him in society, and lower him in the esteem and the opinion of the world, or to bring him into public hatred, contempt, or ridicule. (State *v.* Jeandell, 5 Harring. [Del.] 475.)

Everything written of another, holding him up to scorn and ridicule, and calculated to provoke a breach of the peace, is a libel. (Torrance *v.* Hurst, Walker, 403; Newbraugh *v.* Curry, Wright, 47.)

Every publication by writing, printing, or painting, which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, odious, or ridiculous, is, *prima facie*, a libel, and implies malice in the publisher. (White *v.* Nicholls, 3 How. U. S. 266.)

A publication, to be a libel, must tend to injure the plaintiff's reputation, and expose him to public hatred, contempt, and ridicule. (Armentrout *v.* Moranda, 8 Blackf. 426.)

Any publication, the tendency of which is to degrade and injure another person, or to bring him into contempt, hatred, or ridicule, or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society, is a libel. (Dexter *v.* Spear, 4 Mason, 115.)

A libel is a malicious publication expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. (Commonwealth *v.* Clapp, 4 Mass. 163, 168. *Per* Ch. J. Parsons, quoted in Root *v.* King, 7 Cow. 613.)

A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous intent. (The State *v.* Farley, 4 M'Cord, 317.)

A publication is a *libel* which tends to injure one's reputation in the common estimation of mankind, to throw contumely or reflect shame and disgrace upon him, or hold him up as an object of hatred, scorn, ridicule, and contempt, although it imputes no crime liable to be punished with infamy, or to prejudice him in his employment. So every publication by writing, printing, or painting, which charges or imputes to any person that which renders him liable to punishment, or which is

conveys an idea of its connotation, and enables us to distinguish it from, and prevents our confounding it with, any other term of a *similar*, but not the *same*, import.

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calculated to make him infamous or odious or ridiculous, is *prima facie*, a libel. (1 Hilliard on Torts, ch. vii, § 13.)

Holt, in his treatise, p. 213 [223], defines libel as against private persons thus: "Everything, therefore, written of another which holds him up to scorn and ridicule, that might reasonably (that is, according to our natural passions) be considered as provoking him to a breach of the peace, is a libel." Mr. Mence (Law of Libel, vol. I, p. 120), referring to this passage in Holt, says: "This agrees with his two preceding definitions, and with the common acceptation of the term libel, by making it essential that the subject or object of the attack should be some person or persons; but it disagrees with them, by introducing the tendency to provoke a breach of the peace. It follows that, if this be a correct definition, the other two must be defective, because, in one of them, the tendency, or (as is there said) *the intent* to provoke is required only in cases where the object of the slander is a deceased person, and in that from Lord Coke it is wholly omitted. On the other hand, if the two former definitions be correct, the third must necessarily be inaccurate, for an accurate definition is one which neither omits what is essential, nor admits what is superfluous. * * * And it is to be further observed that the third definition disagrees with the two former and the common acceptation of the term *libel*, not only by introducing the intent or the tendency to provoke, but by leaving out the falsehood and malice. For *libel*, in common acceptation, signifies written slander; and the term slander and all its synonyms, as defamation, detraction, calumny, even without the epithets malicious and injurious, imply falsehood and malice."

"The familiar acceptation of the word libel is no less simple and intelligible [than the term horse-stealing], but the legal and technical use is as if *horse-stealing* stood not only for stealing a horse, but for murder, arson, larceny, and other crimes more or less atrocious; and even for actions not criminal, or of which the criminality is at least doubtful, and not to be measured or ascertained till we have separated them from the greater crimes with which they are confounded. This perverse and cabalistic use of language it is that has given birth to so much of the obscurity with which the law of libel is reproached. And nothing can be easier than to reform it. We have only to consider written challenges to fight as a class by themselves; to class blasphemous writings under the head of blasphemy; obscene and grossly indecent or immoral writings under the head of obscenity; or both these heads, together, under that of offences immediately against God; seditious writings under the head of sedition; and all other writings denominated libels under the two distinct heads of libels and censure, as they are either tainted with falsehood and malice, or criminal by carrying upon them the manifest intent to provoke a breach of the peace, or by having a tendency, or of being merely suspected of having a tendency, so to do." And, on page 181, he says: "This is blasphemy under the title of libel upon the Christian religion, classed or confounded, as is obscenity also, with crimes (if crimes they be), from which it differs as much, both in kind and degree, as murder does from picking a pocket or robbing a hen-roost." (1 Mence on Libel, 125.)

In several of the States, libel has been *defined by statute*. Thus, in Maine, it is enacted that "a libel shall be construed to be the malicious defamation of a person,

When we employ definition in this sense, and for this purpose merely, it ceases to be important whether the definition adopted be strictly accurate. If we always employ the term in that one predetermined sense, it serves to avoid confusion, and enables us to reason upon it with certainty. Mathematical science is certain, not because its definitions are true, but because they are certain; and legal science is only uncertain because its definitions are uncertain.[1] We may ensure certainty by having definitions which, however defective in other respects, at least admit of our using the terms defined

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made public either by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one that is dead, and tending to scandalize or provoke his surviving relatives or friends." And in Illinois it is enacted, "a libel is a malicious defamation, expressed either by printing or by signs, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects of one who is alive, and thereby to expose him or her to public hatred, contempt, or ridicule." Definitions of the like import are to be found in the statute books of some other States.

See Maine Rev. Stat. 1840, ch. clxv, § 1; Iowa Rev. Code of 1851, ch. cli, art. 2767; Arkansas Rev. Stat. 1837, div. VIII, ch. xliv, art. 2, § 1, p. 280; Georgia, Prince's Dig. pp. 643, 644; Hotchk. Dig. p. 739; Cobb's Dig. vol. II, p. 812; California Stat. 1850, ch. xcix, § 120; Illinois Rev. Stat. 1845, Crim. Code, § 120.

[1] "Mathematics will, in no greater degree than theology or metaphysics, give us 'certainty by rigid demonstration' without the assumption of those primary truths which we accept, because we are so constituted that we must accept them."—(Westminster Review, October, 1864; art. Dr. Newman's Apologia.) The question, What is the foundation of mathematical demonstration? was discussed by Dugald Stewart, and the conclusion at which he arrived was, that the certainty of mathematical reasoning arose from its depending on *definitions*. And further, that mathematical truth is hypothetical; if the definitions are assumed, the conclusion follows. Mr. Whewell controverts these views. See "The Mechanical Euclid," &c., and Remarks on Mathematical Reasoning, &c., by the Rev. W. Whewell, M.A., and Edinburgh Review, April, 1838.

"Nothing is harder than a definition. While, on the one hand, there is for the most part no easier task than to detect a fault or a flaw in the definition of those who have gone before us; nothing, on the other hand, is more difficult than to propose one of our own which shall not also present a vulnerable side."—Dean Trench. See Burrill's Law Dict. *voce* Definition, and 2 Wooddes. Lect. 196.

"The greater portion of all law business arises from the impossibility of giving absolute definitions for things that are not absolute in themselves."—(Lieber's Civil Liberty, 23 note.)

always in one and the same sense, and always so using them. We shall not attempt to construct real definitions of slander and libel, but to definitely mark what is meant when those terms are employed; we define slander and libel as *wrongs occasioned by language or effigy*—that is to say, *slander is a wrong occasioned by speech*, and *libel is a wrong occasioned by writing or effigy.*

CHAPTER II.

HOW ONE MAY AFFECT ANOTHER BY LANGUAGE.

Language can have no effect unless published—It must be true or false, commendatory or discommendatory—Must concern a person or thing—Its effect, direct or indirect, or both—Reputation.

§ 23. Language may exist as mere thought, but, before it can have any effect ultra, the individual with or in whom it originated, it must be expressed; it must come into existence as an expression, by sound, as in speech, or by sign, as in writing or effigy; and not only must it be expressed, it must also be *published*—that is, communicated by the individual with or in whom it originated to some *other*.

§ 24. Language when employed to communicate ideas must assume the form of a proposition, or a series of propositions; by a proposition being meant, "discourse which affirms or denies something of some person or thing, the subject of the proposition." Every proposition is an assertion, and must be either true or false—that is, it must assert of its subject that which is true, or that which is false, and the assertion may be either of commendation or discommendation.

§ 25. Language must concern either a person or a thing, or both, and it may concern a person in his individual and natural capacity merely, or in some acquired or artificial relation or capacity as a trader, an office-holder, or as the author, owner, or possessor of some certain thing.

§ 26. The effect of the publication of language upon a person, other than the author or publisher of the language, must be direct or indirect, or both.

§ 27. Language cannot directly affect a thing; whatever direct effect it can have must be upon a person.

§ 28. Language, whether it concerns a person or a thing, may have a direct effect upon the person *to whom* it is published, but upon none other. It may directly affect the feelings, health, belief, or opinion of him to whom it is published, and it may influence or excite him towards a particular course of action or forbearance by himself, or in respect of himself or his affairs, or in respect of some other person or some thing, or the affairs of some other person. It may either please or displease him, or cause him to feel pleased or displeased with some other person or thing, or cause him to do some act or to abstain or resolve to abstain from doing some act to the advantage or disadvantage of himself or some other, or cause him to think better or worse of himself or of some other person or of some thing. That other person may be either he who makes the communication or he whom the language concerns. All the *direct* effects of the publication of language are personal to the individual to whom the publication is made, and can extend no further. The publication of language can have no *direct effects* other than those we have enumerated; whatever other effects may result from the publication of language must be *indirect* or consequent upon one or other of some of these enumerated direct effects.

§ 29. The kind of effect produced, *i. e.*, the direct or indirect effect, must be the same whether the publication be by sound (speech), or by sign (writing or effigy), but the mode of publication may affect the amount of effect produced.

§ 30. It is scarcely supposable that the publication of language which concerns another or his affairs can produce no direct effect, but it is easy to suppose that it may not produce any indirect effect. The publication may occasion a resolve (a direct effect), and that resolve may never be put into execution (produce no indirect effect), or it may occasion a change in the opinion entertained of another, and that other may never be otherwise in any the least degree affected by that change of opinion. The change of opinion may not prevent or occasion any action different from what would otherwise have been done or forborne; while, however, this is supposable, it is improbable; the possibility, however, of such an occurrence suffices for our purpose. Sometimes, indeed, the direct and indirect effects are apparent, and their extent ascertainable; and again, it may be that neither the direct nor the indirect effect is apparent nor its extent ascertainable.

§ 31. It is impossible to anticipate all the indirect effects which may result from the publication of language; experience has made us acquainted with some of them, and to these we shall have occasion to refer by way of illustration.

§ 32. Among the direct effects of the publication of language which we have enumerated is the occasioning the person to whom the publication is made to think well or ill of another. Now, what one thinks of another is the reputation of that other, and hence, when by language one is induced to think ill of another, the reputation of that other suffers disparagement.[1] That others think well of him is as gratifying to a man as that others think ill of

[1] Reputation is the estimate in which an individual is held by public fame in the place where he is known. (Cooper *v.* Greeley, 1 Denio, 347, 365.)

"Character is defined by Webster to be the peculiar qualities impressed by nature or habit on a person, which distinguish him from others; these constitute *real*

him is distasteful, but their merely thinking well or ill of him by itself can neither benefit nor prejudice him. Unless in consequence of the opinion thus entertained, some act is done or forborne in reference to him or his affairs, which would not otherwise have been done or forborne, he is physically and pecuniarily in nowise better nor worse for such opinion. It cannot affect his person or his property. In the ordinary course of events some indirect effect does always result from the publication of language. The probability or improbability of any indirect effect

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character, and the qualities he is supposed to possess constitute his *estimated character* or *reputation*." (*Per* Welles, J., in Carpenter *v.* The People, 8 Barb. 608.)

"If the word reputation, when unqualified, does, *ex vi termini*, or, in common parlance, mean general reputation—as we think it does—it is unnecessary to prefix the word general." (French *v.* Millard, 22 Ohio Rep. 50.)

"Reputation is thinking. I repute a man to be good or bad—that is, I think him to be so." (Maule, J., Doe dem. Padwick *v.* Wittcomb, 15 Jur. 778; 5 Eng. Law & Eq. Rep. 487.)

"The mere entry of something that was in a lease is not any expression of opinion or reputation." (Cresswell, J., *id.*)

"The words character and reputation are often used as synonymous terms though in fact not synonymous." (Buckln *v.* Ohio, 20 Ohio R. 18; French *v.* Mil lard, 22 *id.* 50.)

"Character is a term convertible with common report." (Kimmel *v.* Kimmel, 3 Serg. & R. 337. Gibson, J.)

Character and reputation are the same. (*Id.*, Duncan, J.)

"General character is the estimation in which a person is held in the community where he resides." (Marcy, J., Douglass *v.* Tousey, 2 Wend. 354.)

"Public opinion is the question in common cases where character is in issue." (Boynton *v.* Kellogg, 3 Mass. R. 192. Parsons, Ch. J.)

The word *character* has been variously used in legal proceedings, and sometimes denotes the personal, official, or special character in which a party sues or is sued as executor, officer, &c., but it more frequently refers to reputation or common report. (1 Cow. & Hill, notes, 460, 1768; Leddy *v.* Tousey, 2 Wend. 352; King *v.* Root, 4 Wend. 113.) It is seldom used as synonymous with mere inclination or propensity, or even secret habit, nor is descriptive of the mere qualities of individuals, only so far as others have formed opinions from their conduct. (Safford *v.* The People, 1 Parker's Crim. R. 478)

General character is the result of general conduct. (Sharp *v.* Scoggin, Holt's N. P. C. 541; 3 Amer. Law J. N. S. 145.)

Proof of general bad character—as that term is generally understood and used in society—does not necessarily and legally prove the fact that the witness' character for veracity is bad. (Gilbert *v.* Sheldon, 13 Barb. 627.)

"Chaste character" means actual personal virtue—not mere reputation. (Carpenter *v.* The People, 8 Barb. 603; Crozier *v.* The People, 1 Park. Cr. R. 453; Safford *v.* The People, *id.* 474.)

resulting depends sometimes on the kind of language published, and sometimes on the circumstances of the publication, and sometimes on both the kind of language published and the circumstances of the publication.

§ 33. We conclude, therefore, that there may be an injury to the reputation without, and independently of, an injury to the person or property, and that an injury to the reputation does not necessarily imply an injury to the person or the property.[1]

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[1] Domat Civil Law, Public Law, Book III, enumerates "defamatory libels" among private offences, and in the same book, title 1, "of crimes and offences," enumerates three kinds of "*goods*;" "the third is that good which is called *honor*, and which men value above all other goods." The author then proceeds to inquire what is signified by the term honor, and concludes, "lastly, it signifies reputation." Further on it is laid down that honor may be wounded, either by injurious treatment of the honor or by assaulting the reputation, for one may offend another's honor by actions or by opprobrious language, without lessening his reputation, and we may blemish his honor by words, by writing, and other attempts against his reputation, or one may attack by one and the same way both the reputation and person of another.

CHAPTER III.[1]

RIGHTS; DUTIES; WRONGS; REMEDIES.

Description of Rights and Duties—Wrongs, Rights, and Duties undefinable—What determines of any act if it be a Wrong—Remedies—Injunction—Original Writs.

§ 34. Having in a preceding chapter, [ch. i,] described slander and libel as wrongs, it is proper to explain what is meant by a wrong, and to that end we must briefly consider the nature of rights and duties. For the opposite to *a right* is not *a wrong*, but *a duty*.

§ 35. Rights and duties are neither persons nor things, but powers and obligations. A right is a power to do or forbear or require another to do or forbear. A duty is an obligation, a necessity to do or forbear, or to submit to some act of another. We hear frequently of "moral and social duties of imperfect obligation,"[2] but really there is no such thing as a *duty* of *imperfect* obligation, what is so denominated is really a right—a right which *should* be exercised, but which, as in the case of all rights, the person in whom it is vested, may or may not exercise at his option. "Rights are universal and unexceptive, or, if not so, then they are none at all."[3]

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[1] For the tenor of this chapter we acknowledge our indebtedness to the general part of "Thibaut's System of Pandekten Rechts," as translated by Lindley; also to Mr. Maine's admirable book, "Ancient Law, or, an Inquiry into the Origin of Legal Ideas." As to rights and duties, reference may be had to Austin's Lectures on Jurisprudence.

[2] Harrison *v.* Bush, 5 El. & Bl. 344.

[3] Essay on Ultimate Civilization. By Isaac Taylor.

§ 36. The object of a right or duty is a transaction. By transaction is meant an act, and the occasion on which the act is enacted.

§ 37. Rights and duties are reciprocal. The act which one has the right, the power, to do or forbear, that no other can or should hinder or compel the doing or forbearing; but to such doing or forbearing it is the duty, the necessity, of every other to submit; and what one has the right, the power, to command another to do or forbear, that it is the duty, the necessity, of that other to do or forbear; what it is the duty of one to do or forbear, that it is the right of some other to have done or forborne; what it is the duty of one to do, to that it is the duty of every other to submit.

§ 38. Rights and duties pertain solely to persons. A thing cannot have any rights and cannot owe any duties. And as a thing has no rights, a person cannot owe a duty to a thing.

§ 39. The exercise of a right is always optional; the performance of a duty is always compulsory. One may forego the exercise of a right, or exercise it, at his option, for either way no right of any other suffers; but one cannot, at his option, forego the performance of a duty; because to omit the performance of a duty is to take away a right somewhere, either in society or an individual, the right to have such duty performed. Therefore every act done in exercise of a right is a voluntary [optional] act, and every act done in the performance of a duty is an involuntary [not optional] act. One may in fact perform his duties willingly, but as the performance or non-performance is not optional, and may be enforced, performance is properly regarded as involuntary.

§ 40. Rights must be exercised and duties must be

performed strictly and in good faith. An act which exceeds the prescribed limits of a right is not the exercise of that right, and an act which falls short of the prescribed limits of a duty is not the performance of that duty.

§ 41. Rights and duties cannot exist in the absence of a supreme power somewhere, which protects the exercise of the one and enforces the performance of the other; that supreme power is called a law, and that branch of it which relates to the rights and duties of individuals in their social relations constitutes the municipal law. In *some* sense, therefore, it is proper to say that rights and duties are the *results of law*, and if this be granted, it must follow that all rights and duties of which the municipal law takes cognizance are legal rights and legal duties. There can be no such right recognized by law as a natural right. A right anterior to or independent of the law can be a right only of superior physical power.

§ 42. Every act must be done either in the exercise of a right or in the performance of a duty, or neither in the exercise of a right nor in the performance of a duty; and every act must be either such as the law permits and does not punish or such as the law does not permit and will punish. Every act done in the exercise of a right or in the performance of a duty is a permitted act. Every act done neither in the exercise of a right nor the performance of a duty is an unpermitted act. Every act which the law permits is lawful, and every act which the law does not permit is unlawful.

§ 43. A lawful act cannot amount to a wrong, but every unlawful act is a wrong; and as every act must be either lawful or unlawful, every act must be either a wrong or not a wrong. The rule that for every wrong the law provides a remedy holds true only by postulating that only that act is a wrong for which the law provides

a punishment or *a* remedy. The rule that for every wrong the law provides a remedy is not universally true, because sometimes although a wrong has been committed, the subject of the wrong is by some means estopped from claiming any redress. The formula by which this rule is expressed is, that one cannot take advantage of his own wrong. An act may be such as not to be obnoxious to *every* remedy, but if it is obnoxious to any remedy it is a wrong.

§ 44. Different laws prescribe different rules of right and duty, and where there are courts of different jurisdictions that may be a wrong in one jurisdiction which is not a wrong in another; as where there are civil and criminal courts, and as in England where there are common law courts and ecclesiastical courts. We may sometimes determine of any act whether or not it is a wrong by inquiring whether or not the law provides for it *any* remedy or punishment. There can be no civil right where there is no remedy.[1] "It is a mockery to talk of existing rights without applying corresponding remedies."[2] If there is no remedy we conclude there is no wrong—meaning, of course, legal wrong. This, it must be conceded, is an illogical and inverse method of arriving at the desired conclusion, but we find it oftentimes resorted to, as the best attainable standard by which to determine of any act if it be a wrong.[3]

§ 45. Wrongs which only affect society in general, and, so far as they affect society in general, are distinguished from wrongs affecting only individuals, by denominating them *crimes*. Hereafter we shall invariably use the term *wrong* to signify an act injuriously affecting only individ-

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[1] B'k of U. S. *v.* Owens, 2 Peters, 539.

[2] Fowler *v.* Lindsay, 3 Dallas, 413.

[3] "The remedy may always be referred to as illustrating the right and *e converso*." (Van Rensselaer *v.* Jones, 2 Barb. 656.)

uals. Wrongs are direct or indirect. Direct wrongs are those where the act done may be *per se* a violation of a right—a blow is of this character. Indirect wrongs are those where the act done cannot be *per se* a violation of a right, and only becomes a violation of a right by reason of some consequence resulting from that act. The act of publishing language is of this character.

§ 46. We are accustomed to describe law as the supreme power in the State, commanding what is right and prohibiting what is wrong; but this, besides being untrue,[1] does not aid in determining what is a legal right or a legal wrong. So, too, a wrong is correctly enough described, not defined, as an invasion of a right, but unless or until we know what is a right, we cannot know when a right has been invaded.

§ 47. If we could catalogue rights, and distinguish each by an intelligible and unvarying definition, we should then have no difficulty in ascertaining when a wrong has been done. But the nature of a right forbids any such proceeding. We do, indeed, find text writers and judges speaking of the right of speech, the rights of the press, and the right of property. Blackstone, and others following him, state that the *absolute natural rights* are the rights of life, liberty and reputation. Text writers also speak of *relative* rights and *tangible* rights, but all these are mere words, entirely illusory, capable of no practical application. The utmost that can be derived from all that has ever been written on this subject is, that a man has *some* rights pertaining to his person, his property and his reputation; the nature of a right is nowhere attempted to be defined or explained, except in the illogical way of stating a rule with a multitude of exceptions, leaving us in doubt

[1] See, Chisholm *v.* State of Georgia, 3 Peter's Cond. Rep. 74.

as to each particular case which arises whether it comes within the rule, or is one of the exceptions.

§ 48. While defining a wrong as an invasion, meaning every invasion of a right, text writers have contented themselves with speaking of the absolute right of property, the absolute right of reputation, &c.[1] Now, if the words "*absolute right of property*" have any meaning, they must mean that one has such a right to his property that no one may, under any circumstances, take it from him; and if this be so, and every invasion of a right be a wrong, it must follow that *every* deprivation of property is a wrong. We know this is not true; one may be deprived of his property in many ways without a wrong

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[1] "Rights of persons are divided into *absolute* and *relative*. 1 Ch. Pl. 137. This classification is recognized by all our elementary writers. 2 Kent's Com. 129; 3 Bl. Com. 138." (Delamater *v.* Russell, 4 How. Pr. R. 235.) "The character of individuals is unquestionably one of their absolute and personal rights. It is, therefore, unnecessary to make any distinct affirmation that the protection of it most immediately falls within the common law. Reputation, indeed, is not only one of our perfect rights, but that which alone gives a value to all our other rights." (Holt on Libel, p. 15.) "The security of his reputation, or good name, from the arts of detraction and slander are rights to which every man is entitled by reason and natural justice." (1 Bl. Com. book I, ch. i.) "The use of the law consisteth principally in these three things: * * * * III. For preservation of men's good name from shame and infamy." Bacon's The Use of the Law. His Lordship says nothing further on the subject in that essay.

Slander or libel is an infringement of the *absolute* rights of persons. (Parker J. Delamater *v.* Russell, 4 How. Pr. R. 235.) "Whether reputation be by the law of nature one of the *absolute* rights of persons or not, the common law of England does not so consider it. The law of unwritten slander is incompatible with it, and in part establishes a different principle. For it would follow from that principle, and he evidently means by it, that no man can lawfully say or publish anything to the disadvantage of another, even though it be true, and he is prepared to prove its truth." (1 Mence on Libel, 132.) Blackstone and others, translating *personæ*, person, instead of status or condition, place among the rights of persons the right of personal security, the reputation, &c., whereas the right to reputation is among the rights *in rem*. (Edinburgh Review, Oct. 1863, p. 239, Amer. Reprint.) The right which Blackstone styles the right of reputation is original or innate as opposed to acquired. This right has no connection with a natural right in the other sense of the term. Blackstone has confounded them, and, supposing the right of reputation to belong to the law of persons, has called it an absolute right of persons. (2 Austin's Lect. on Juris. 268, 476, 3 id. 179.)

being done. A man's property may be taken from him directly for public use, on making due compensation, or it may be taken from him to satisfy his obligations, and it may be indirectly taken from him in many ways by acts subjecting him to loss, for which the law affords him no remedy. So, too, if the supposed right to reputation be an absolute right, then every invasion of it must be a wrong; but reputation is often invaded without such invasion amounting to "a wrong," hence the inutility, for any practical purpose, of the definition of a wrong as an invasion of a right. The truth is, that a man has the right to the uninterrupted enjoyment of his property to such an extent only, and subject to such conditions, as the general welfare of the community demands, and so of reputation. It must be, therefore, that instead of saying of one he has an *absolute* right to property or reputation, we should say he has a right thus and so, describing it with such limitation and qualification as will make it true that every interference by another with such an enjoyment of it will amount to a wrong. This may be difficult, or it may be impossible; if the latter, as we conceive it to be,[1] let the attempt be abandoned, but it furnishes no reason for describing that as an absolute right which is something else. "It is difficult to say when night ends or day begins, or to draw the line between them, yet day and night are not the same thing."[2]

§ 49. It is not so proper to say that the law prescribes what is right, and prohibits what is wrong as to say that law determines rights by prescribing duties, and independently of any positive enactment, all legal duties are

[1] "The time is passed when * * it was believed that everything was strictly definable, and must be compressed within the narrow limits of an absolute definition before it could be entitled to the dignity of a thorough discussion. The hope of being able absolutely to define things * * betrays a misconception of human language, which, itself, is never absolute except in mathematics. It misleads." (Lieber's Civil Liberty, 23.)

[2] Att'y-Gen'l *v.* Daken, Law. Rep. II Ex. 295.

comprised in this one prohibition. *No one shall, without a legal excuse, do or forbear any act, by which doing or forbearing there results a breach of the peace, injury to the community, or damage to the person or property of another.*

§ 50. What determines of any given act whether or not it is permitted, *i. e.*, lawful; or unpermitted, *i. e.*, unlawful; whether there is or is not a legal excuse for the doing such acts, is the *occasion* upon which it is enacted.[1] The occasion being the entire group of circumstances surrounding the act, including the actor, the patient or person acted upon, the kind of act, the manner of effecting the act, the motive of the actor, and the consequences of the act. It is the occasion to which we must, in every instance, refer to ascertain whether there was or was not a legal excuse for the act. Everything considered, was the act lawful or unlawful? Was it in exercise of a right or performance of a duty? As it is manifestly impossible to preconceive or anticipate every possible group of circumstances, so necessarily it is impossible to catalogue rights and duties—that is, to catalogue the acts which may or may not be done or forborne.

§ 51. The impossibility of framing such a definition of a right or of a duty as shall enable us to say of any particular act by itself, that it is lawful or unlawful, is evident. The utmost we can do is to say that an act done under a certain given state of circumstances is a permitted act, one the actor *had the right* to do, or that it is an unpermitted act, one the actor *had not the right* to do—that is, the doing of which it was his duty to forbear.

§ 52. The law, besides prescribing duties, provides the means called remedies for protecting rights and redressing wrongs. It will, in some cases, interpose by injunction to prevent the perpetration of a wrong, but, as a general

[1] Hosmer *v.* Loveland, 19 Barb. 115.

rule, the publication of an alleged libel will not be stayed by injunction.[1]

§ 53. The ordinary mode of remedying a wrong is by an action. Actions were anciently commenced by original

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[1] The court of star chamber, which Lord Campbell described as a court of criminal equity (Emperor of Austria *v.* Day, 7 Jur. N. S. 483), and which description was quoted with approval by Chief Baron Pollock (The Alexandria, MS.), was in the habit of restraining the publication of certain libels (Hudson's Star Chamber). After the abolition of that court, Chief Justice Scroggs, and the other judges of the King's Bench, prohibited the publication of a periodical called "The Weekly Packet of Advice from Rome; or, the History of Popery." For this, Scroggs was impeached (8 Howell's State Trials, 198). In Du Bost *v.* Beresford, 2 Camp. Rep. 511, Lord Ellenborough said the exhibition of a libelous painting might be restrained by injunction. That was an *obiter dictum*, and is said to have excited great astonishment in the minds of all the practitioners in the courts of equity in England. (Horne's case, 20 Howell's State Trials, 799 note; 10 Campbell's Lives of the Chancellors, ch. ccxiii.) In Burnett *v* Chetwood, 2 Merivale's Rep. 441, note, Lord Chancellor Parker granted an injunction to restrain the publication of a translation of a book from Latin into English, on the ground that the book in English might have a hurtful public tendency not likely to occur while the matter remained in Latin. In Brandreth *v.* Lance, 8 Paige, 24, the chancellor, on demurrer to a bill praying an injunction to restrain the publication of a libelous pamphlet, dismissed the bill on the ground that the court had no jurisdiction to interfere, no right to "literary or medical property" being invaded; and see Hoyt *v.* McKenzie, 3 Barb. Ch. R. 320. In Clarke *v.* Freeman, 11 Beavan, 112; 12 Jurist, 149; 17 Law Jour. Rep. Ch. 142, the plaintiff, a physician, applied for an injunction to restrain the defendant from, among other things, publishing an advertisement so expressed as to raise the inference that certain pills sold by defendant were sold by him on behalf of the plaintiff. The court held the advertisement in question amounted to a libel on the plaintiff, and dismissed the bill; because, to grant the injunction, "would imply that the court has jurisdiction to stay the publication of a libel, and I cannot think it has." This case is questioned in supplement to Drewry on Injunctions, 34, but not on the ground that the court had jurisdiction to restrain the publication of a libel; and Clarke *v.* Freeman is also questioned in Springhead Spinning Co. *v.* Riley; and Dixon *v.* Holden, *infra;* and in Maxwell *v.* Hogg, Law Rep. II Eq. 310.

A person, whose name was on the register of persons whose notes had been protested, applied to the Court of Session, in Scotland, for an *interim* interdict to prevent, so far as his own name was concerned, the publication of a copy of the register. The court decreed for the application. *Held*, by the Lords, reversing that decree, that the interdict ought not to have been granted. (Fleming *v.* Newton, 1 Ho. of Lords, Cas. 363.) "The king has no authority to restrain the press." (Mansfield, Ch. J., Stationers' Co. *v.* Partridge.) An injunction was granted against the publication of a notice stating that the plaintiff, a merchant, was a partner in a bankrupt firm (Dixon *v* Holden, Law Rep. VII Eq. 488; see also Springhead Spinning Co. *v.* Riley, Law Rep. VI Eq. 551). In an unreported case (Meserole *v.* Goldsmith) decided January, 1870, in New York, Justice Ingraham interdicted the publication of a circular purporting to be the report of a trial relative to a patent right for paper-collars. There

writ.[1] These writs differed from each other according to the nature of the wrong to be redressed. These writs were preserved in the Chancery in *The Register of Writs*, which register was printed and published in the reign of

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is now pending in the Superior Court of New York, Hovey *v.* Rubber Tip Pencil Co., an action to restrain the publication of a circular affecting plaintiff's business. As to courts restraining reports of their proceedings, see *post note* to § 231. In Missouri, in the case of Millier *v.* Shepherd, now pending, an injunction was granted restraining the publication of "Bradstreet's Commercial Report," a mercantile agency report, and containing matter affecting the credit and standing of the plaintiff as a merchant. In Dixon *v.* Holden, *supra*, Malins, V.-C., says: "I go further, and say if it [the publication sought to be restrained] had only injured his [plaintiff's] reputation, it is within the jurisdiction of this court to stop the publication of a libel of this description, which goes to destroy his [plaintiff's] property, or his reputation, which is his property, and, if possible, more valuable than any other property. In this case, I go on general principle, and I am fortified by authority. General principle is in its favor, but authority is not wanting. * * * In the decision I arrived at, I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation. Professional reputation is the means of acquiring wealth, and is the same as wealth itself." In deciding Brandreth *v.* Lance (*supra*), the Chancellor referred to 2 R. S. 737, s. 1, pt. IV, ch. xi, tit. 6, art. 1. This section confers on courts the power to bind persons to give security to keep the peace in certain cases, and its last clause reads thus: "This section shall not extend to convictions for writing or publishing any libel, nor shall any such security be hereafter required, by any court upon any complaint, prosecution, or conviction for any such writing or publishing." The revisers, in their note to that section, say, in reference to the above-recited clause, that it is *new*, and "it is conceived that this provision virtually takes away from the courts the common law power of binding over a party guilty of publishing a libel." As to the common law power of binding to good behavior, see Hawkins' Pleas Cr., ch. lxi, and Viner's Abridgment, tit.—Good behavior; Highmore on Bail, 248. By Laws of 1860, ch cviii, § 20, p. 1007, every person in the city of New York shall be deemed guilty of disorderly conduct "who shall use any threatening, abusive, or insulting behavior with intent to provoke a breach of the peace." The courts interfere by injunction to restrain the publication of letters written by a party or his testator to the defendant or others. (2 Story's Eq. Juris. §§ 943 to 949; Woolsey *v.* Judd, 11 How. Prac. Rep. 49; 4 Duer, 379; Resp. *v.* Duane, 1 Binney, 98; 2 Stark. Slan. 268, note 1.)

[1] One of the earliest refinements in forensic science was that of classifying the various subjects of litigation, and allotting to each class an appropriate *formula* of complaint or claim. Such was the practice in ancient Rome almost as early as the law of the twelve tables, and continued until the time of Constantine, who abolished the judicial *formulæ*. These *formulæ* in the English law were called *writs*. How, or when, or whence introduced into England is undetermined. (Stephens' Pl. ch. i, and *id.* appendix, note 2.)

Henry VIII of England.[1] The most ancient writs provided for the most obvious kinds of wrongs, as nuisance, waste, trespass, &c.; but in the progress of society, it seems that cases of injury arose new in their circumstances, and not within any of the writs then known, and that the power to issue writs of a new kind was conceived not to exist without the authority of the Parliament; accordingly, by the statute of the 13 Edward I, chap. xxiv, called the statute of Westminster the IId (say A. D. 1285), it was provided "That as often as it shall happen in the chancery, that in one case a writ is found, and *in a like case* (*in consimilu casu*) falling under the same right, and requiring like remedy, no writ is to be found, the clerks in the chancery shall agree in making a writ," &c. Under the sanction of this act, large accessions were made to the existing stock of original writs.[2] These new writs were said to be issued upon *the case*, and the actions commenced by them were designated *actions upon the case*, or *actions of trespass on the case*. Among this class was the action of *trespass on the case for words*—the ancient form of the action—now known as the action of slander or libel, and which is the only *civil* remedy for slander and libel.

§ 54. The consideration of the course of procedure in an action pertains more properly to a subsequent stage of our inquiry. We will here merely remark that the rules by which we determine when a wrong has been committed, and the rules of pleading, of evidence and of practice, although they have a certain inter-dependence, are in fact,

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[1] 4 Reeve's Hist. 426, 432. Original writs were abolished in England by statute. (2 Will. IV, ch. xxxix.)

[2] Although the new writs were to be framed only *in consimilu casu*, "many writs were framed for various kinds of trespasses unknown in former ages." (Sullivan's Lectures, Lect. 33; Stephens' Pl. 7.) The first reported action of trespass on the case is said to be found 22 Edw. III, Ass. 41. (Reeve's Hist.) That would be A. D. 1349. We have not verified this statement, and doubt its correctness. The action on the case has its counterpart in the *actio utilis* of the Roman Law. (See 2 Austin's Lect. Jur. 303.)

and, if we would avoid confusion, must ever be regarded as separate and distinct rules. Preliminary to attempting an analysis of the wrongs, slander and libel, we shall in our next chapter consider what is the gist of the action for slander or libel.

CHAPTER IV.

WHAT IS THE GIST OF THE ACTION FOR SLANDER OR LIBEL.

History Silent as to the Introduction of the Action for Slander—Hypothesis Necessary—How the Law Protects Reputation—Fiction—Pecuniary Loss the Gist of the Actions for Slander and Libel.

§ 55. It is not known with certainty, or, rather, all are not agreed, either as to the origin of the remedy by action for slander or libel, or as to the gist of such an action, and neither history nor judicial decision furnishes any satisfactory solution of these doubts. We know, indeed, that all nations have recognized the capacity for injury inherent in language, and have provided some means for punishing offences arising from an abuse of the gift of speech; but we seek in vain among these laws for a clew to the principles by which at this day we may determine when a wrong by slander or libel has been occasioned, and when we may properly invoke the remedy, by action for slander or libel.[1] As the action of trespass on the case owed its

[1] After a reference to all available authorities on the subject of the ancient laws against offences by language, and preparing a lengthy note on the subject, we conclude that however interesting as history, its publication here would not advance the object of this essay. The curious student may refer to Holt on Libel, ch. i, vol. II.; 1 Mence on Libel, ch. viii, ix; Starkie on Slander, 3 Johns. Cas. 382; Wilkins' Leg. Anglo-Sax.; Lambard's Saxon Laws; Nicholson's Prefat. ad Leg. Anglo-Sax.; Stiernhook De Jure Vetusto Suconum et Gothorum; Tacitus' De Mor. Germ.; Saltern De Antiq. Leg. Brit.; Dugdale's Origines Juridicales; Disney's Ancient Laws against Immoralities; Gurdon's History of Court Baron and Court Leet; Petit's Leges Atticæ; Johnson's Institutes of the Civil Law of Spain; Michaelis' Com. on the Law of Moses, Smith's Translation; The English Statutes, 3 Edw. I; 2 Rich. II; 1 Phil. and Mary; 1 Eliz.; the publications of the English Record Commissioners; Pitcairn's Criminal Trials in Scotland. For seventeenth century ideas of the law of libel in

origin to the provisions of the statute, 13 Edward I, A. D. 1285, it seems necessarily to follow that the action of trespass on the case for words must date its origin at some period subsequent to that statute;[1] but it does not thence follow that anterior to the introduction of the action of trespass on the case for words, there existed in England no remedy for wrongs by language. We know that for centuries prior to the statute of 13 Edward I, offences which we at this day designate slander and libel were recognized and punished; but of the time and manner of introducing the remedy by action of trespass on the case for words we know absolutely nothing. The reported decisions in the courts of law in England, printed and in manuscript, reach back at least as far as A. D. 1216, but we find in those reports no reference to an action for words earlier than A. D. 1321.[2] That decision merely serves to inform us that at that time existed the struggle for jurisdiction which probably commenced on the division of the courts into courts temporal and courts ecclesiastical, and which continued certainly until after the reign of the first James of England.

§ 56. Since, then, we can obtain no positive information on the subject of our inquiry, we are driven to hypothesis. Our *unwritten* law is based on the so-called com-

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Massachusetts, see Sketches of the Judicial History of Massachusetts; and among the Dutch in New York, see Valentine's Manual of Common Council for 1849, p. 402, 421, and under English rule: Valentine's Manual for 1847, p. 359; and Thomas' Hist. of Printing in America. And see List of Authors following Table of Cases, *ante*.

[1] Section 53, *ante* and note 2, p. 93, *ante*, Mr. Pomeroy, in his introduction to Municipal Law, says, § 199: That before the statute "there was absolutely no provision for a vast majority of the legal rights * * which are now the most common and important." And § 201: The effect of the statute "was to extend this action to cases where the injury was *consequential* or indirect."

[2] That case is in the year book of Edward II (Hil. 14 Edw. II, p. 416); it was an attachment upon a prohibition against proceeding in a court Christian for defamatory words. There is nothing in the report to indicate that it was a novel proceeding. *March*, in his Treatise on Slander, says he could find no action for scandalous words before Edward the Third's time, and only one such action during fifty years of that

mon law of England, and whatever the number of sources which contributed to make up that complex, vaguely understood and imperfectly ascertained set of legal ideas denominated the common law of England, it is certain that so much of it as pertains to the rights of persons is mainly derived from the Anglo-Saxon and Roman civil laws. Of both of those systems of laws history furnishes us ample details. We know that Rome held possession of Britain from about the end of the first half century of the Christian era to about the middle of the fifth century (say from A. D. 45 to A. D. 448), and during this period Roman civil law was administered in England. When the Romans abandoned Britain the Saxons became its masters, and, alternately with the Danes, so continued until the Norman conquest (A. D. 1066). The Saxons introduced their own system of laws. The controlling idea of those laws was the maintenance of the peace and protecting the person and property. They did not, nor does the law at this day, give *directly* any remedy for outraged feelings or sentiments.[1] With few exceptions, these laws designed to

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King's reign; three such actions during the reign of Edward the Fourth; not one in the reign of Henry the Seventh; and only five in thirty-eight years of the reign of Henry the Eighth. At p. 5 he says: Actions for scandal are amongst the most ancient in the law.

[1] See Tilley *v.* Hudson R. R. Co., 23 How. Pr. R. 370; Green *v.* Hudson R. R. Co., 32 Barb. 25; Lehman *v.* City of Brooklyn, 29 Barb. 234; Flemington *v.* Smithers, 2 C. & P. (N. P.) 292; Terwilliger *v.* Wands, 17 N. Y. 54; Wilson *v.* Goit, 17 N. Y. 442; Bedell *v.* Powell, 13 Barb. 183; the cases to the contrary were overruled. Mence, commenting on the statement of Holt, that the few actions for slander to be found in the earlier law reports was creditable to the people of those times, remarks that the credit was not due to the good manners but to the fact that "the common law took cognizance only of injuries to the person and property." (1 Mence on Libel, 333.) Perhaps among the reasons why there were so few actions for slander, one may be that the parties themselves undertook to redress the injury without resorting to the law. When King Harold required of Reidar, the Icelander, a blood fine for killing one of his (Harold's) followers, Reidar refused to pay it, because the man brought his death upon himself, by behaving rudely to him. See Den Danske Erobring of England og Normandiet; Copenhagen, 1863. In Baker *v.* Pierce (2 L'd Raym. 960), Holt, Ch. J., said he remembered a story told by Mr. Justice Twisden, of a man who had brought an action for slander, who, on judgment being given against him, said if he had thought he should not have recovered he would have cut the de-

remedy every wrong by a pecuniary mulct or fine (*were*)[1] proportioned and adjusted to the kind and degree of the wrong committed. In that form of trial which corresponded to our present jury trial, the question in Saxon times was only the guilt or innocence of the accused.[2] The penalty (the damages) was fixed by the codes. At a later period, after the Norman Invasion, and when the Anglo-Saxon codes had been lost by desuetude, the courts fixed the amount of damages; this power, when jury trials assumed their present phase, appears to have been transferred by the court to the jury—the court, however, retaining its power to regulate the damages.[3] For ages the courts always revised the allowance by the jury of damages, and the power is still held and exercised by the

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fendant's throat. The Jesuits sanctioned killing for slander, particularly for slander of one in religious orders, but they held that the killing should be secret, and not open, to create scandal. (Pascal Letters, xiii.) In the "Ethica Christiana," by Father Benedict Stattler, published in 1789, it is stated, paragraphs 1889, 1891, and 1892, that a Christian may, to prevent a "contumelia gravis certo provisa * * * * aut calumnia" * * * murder the "injusti aggresoris aut calumniatoris." Father Stattler's book was published "cum permissu superiorum," and is said to be still in use as a manual for ecclesiastics.

The necessity of protecting character by law could not obtrude itself till society had begun to assume a complicated form. (Borthwick on Libel, 1.) The coarseness of language indulged in formerly must strike every student of history. Henry III (A. D. 1248) spoke of the Aldermen of London as "London boors," applied a like epithet to the Bishop of Ely, and dismissed Bishop Aymer by telling him to go to the devil. See Miracles of Simon de Montfort and works of Roger Bacon.

[1] Damages correspond to the *Anglo-Saxon were:* 1 Palgrave's Rise, &c., Eng. Commonwealth, 205; Bosworth's Anglo-Saxon Dict., tit. *Were* and *Wite;* 2 Lappenburg's History of England (Thorp's Translation), 336.

[2] As to the origin of trial by jury, &c., see Forsyth's Hist. of Trial by Jury, and Stephen's Pl. Appendix, note 40; 2 Reeves' Hist. 270; Fortescue de Laudibus Legum Angliæ, ch. xxv, xxvi, xxvii, and notes to the edition by Amos; 2 Hallam's Middle Ages, 388–406, note, 11th edit.; Palgrave's English Commonwealth, 272.

[3] See Viner's Abr., tit. Damages—J. K. L. M., as to powers of courts to increase or mitigate damages. The right was denied in an action for slander, because there is in such an action nothing apparent for the judgment of the court to act upon. *Id.* K. See Cassin *v.* Delany, 38 N. Y. 178; but in Gostling *v.* Brooks, 2 F. & F. 76, the court in bank upheld the verdict for the plaintiff, but reduced the amount of damages. The damages increased for giving plaintiff bad food to eat. (1 Rolle, 89.) And in cases of maihem. See Jacobs' Law Dict., tit. Maihem. Rolle Ab., tit. Damages; 2 Sharswood's Blackstone's Comm., 121 *note.*

courts, although at the present time it is customary to make the revision by granting a new trial. Even now the courts not unfrequently order a reduction of damages, or a new trial, at the election of the party to whom damages have been awarded. The Anglo-Saxon[1] codes provide for offences occasioned by language, but they are all offences which amount to public wrongs or crimes, sedition, or treason, rather than private wrongs or torts. These codes are in fact barren of any provision of a pecuniary fine or penalty for a private injury by language. While the Saxons were yet dominant in Britain, Christianity, which had been early introduced into England and become extinct, was reintroduced through the Church of Rome—say A. D. 596. The introduction of Christianity did not abrogate the Saxon laws, but it at least supplemented upon them many precepts of Christianity, and, beyond a doubt, laid the foundation for the dictum that Christianity is part of the common law of England.[2] The clergy rose

[1] Sir Francis Palgrave, in his "History of Normandy and of England," which unhappily he was not spared to complete, objects to the term *Anglo-Saxon* as a designation of the English of the ante-Norman period. He denies there was any Anglo-Saxon people or language, properly so-called, and says: "If you had asked Alfred what he had in his hand, he would have answered it was an *Englisc boc* * * * The name of our nation then, as now, was English." (Vol. III, p. 631, edit. 1864.) Mr. Palgrave himself employs the term *Anglo-Saxon* in his earlier works.

[2] We do not intend to assert that Christianity *is* parcel of the English common law. Sir Matthew Hale, in Rex *v.* Taylor (Ventris, 293; 3 Keble, 621; Tremayne's Pleas of the Crown, 226;) following Lord Coke, uttered a dictum that "Christianity is part of the laws of England." That dictum has been repeated in subsequent cases. See, among others, Rex *v.* Webster, Fitzg. 64; 2 Str. 834; Reg. *v.* Gathercole, 2 Lewin C. C. 237; Reg. *v.* Hetherington, 5 Jur. 529, Q. B.; Rex *v.* Paine, 1 East P. C. 5; Lindenmuller *v.* The People, 33 Barb. 548; Bedford Charity, 2 Swans. 527; Da Costa *v.* Paz, 2 Swans. 420 *n.*; Att'y-Gen'l *v.* Pearson, 3 Mer. 399; Andrew *v.* N. Y. Bible & Prayer Book Soc., 4 Sandf. 157; 1 Bish. Cr. Law, § 945, 947; 2 *Id.* § 87. Jefferson, in a letter to Major Cartwright, controverts the dictum that Christianity is a part of the common law. This letter is commented upon in the Inaugural Discourse delivered by Joseph Story on taking the chair of Dane Professor at Harvard University, and in an article in 9 American Jurist, and see Life and Letters of Joseph Story, vol. I, pp. 430–434; vol. II, pp. 8, 462, 463; and on this subject see the arguments of Webster and Sergeant in the Girard will case; and Lewis on Authority in Matters of Opinion. Holt says Alfred made Christianity part and parcel of the common law. (Holt on Libel, 32.) See strictures on this dictum, 1 Mence on Libel, 303.

to great power in the State, they sat in the courts of justice, and took part in the decision of all judicial controversies, and they claimed and exercised a sole jurisdiction over all questions involving considerations of moral right and wrong (*sins*), rather than considerations of legal rights or rights of property; those rights in fact which were provided for by the letter of the laws. The jurisdiction thus claimed and exercised included heresy, adultery, perjury, and defamation. This jurisdiction was assumed and exercised with the avowed design not of compensating the injured party, but for the reformation of the offender. Reparation in damages was made only in the cases and for the offences provided for in the codes. In the exercise of their powers the clergy adopted—at least to some extent —the forms of procedure in use in the Roman law.

On the Norman accession, William introduced the feudal system, but professed to respect and continue in force the Saxon laws. He separated the courts into courts of different jurisdictions, the clergy no longer sat in the temporal courts, but apart in courts Christian or Ecclesiastical. It would seem they were debarred the exercise of any jurisdiction in controversies in which money damages were claimed. The line of demarcation between the jurisdiction of the temporal and ecclesiastical courts appears to have been that, where compensation was sought, resort was to be had to the temporal courts; and where the reformation of the

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The Dome-Book of Alfred, said by Blackstone to have been extant so late as the reign of King Edward the Fourth, and to have been lost, was supposed by both Hallam and Turner never to have existed. It has since been published by the Record Commissioners, vol. I, pp. 55–101. It commences with the ten commandments, followed by many Mosaic precepts. After quoting the canons of the Apostolical council at Jerusalem, Alfred refers to the command, "As ye would that men should do unto you, do ye also to them;" adding, "from this one doom, a man may remember that he judge every one righteously he need heed no other doom book."

The Puritan Colony of New England resolved at a "General Court, October 25th, 1639 * * * the worde of God shall be the onely rule to be attended vnto in ordering the affayres of government in this plantatio."

offender only was desired, then resort was to be had to the ecclesiastical courts. And where the ecclesiastical courts entertained jurisdiction of suits in which money might be demanded, the temporal courts restrained them from proceeding therein by the writ of prohibition. As there is now, so there must ever have been, a distinction between language occasioning pecuniary or temporal injury, and language insulting and provoking and harrowing to the feelings, without occasioning pecuniary or temporal injury. This distinction seems to have been clearly recognized by the statute *circumspecte agatis*,[1] and leads almost irresistibly to the conclusion that the gist of the action of trespass on the case for words, was the pecuniary loss, and not for the injury to the reputation—the defamation. In the early stages of society, only that language which put one in peril of punishment, loss of inheritance, or of social companionship, could occasion pecuniary loss;[2] but as society progresses, as more faith

[1] The statute thus styled was passed 13 Edward I, stat. 4, ch. i, A. D. 1285. The King to his justices sendeth greeting: "Use yourselves circumspectly (*circumspecte agatis*) in all matters concerning the Bishop of Norwich and his clergy, not punishing them if they hold pleas in courts Christian of such things as be *meer* spiritual * * * and for laying violent hands on a clerk, and in canons of defamation *it hath been granted already* that it shall be tried in a spiritual court when money is not demanded but a thing done for punishment of sin." By this it appears, said Lord Coke, that the cognizance of defamation was granted by act of Parliament. (2 Inst. 492.) See Appendix D, No. 11, to Ecclesiastical Comm'rs Report, Feb. 27, 1832; and Stephens' Ecclesiastical Statutes, pp. 26–34. The statute 9 Edward II, stat. 1, ch. iv, A. D. 1315, enacted: "In defamation, prelates shall correct also in manner above said, the King's prohibition notwithstanding."

It seems of those *defamations* by which the party is *damnified* the spiritual court cannot hold plea. (Vin. Ab. tit. Prohibition, D. 5.) In Bacon's Abr. tit. Courts Ecclesiastical D, it is said: "No suit can be instituted in an ecclesiastical court for defamatory words in writing, because they may be the subject of an action at law." (Comb. 71.) This, however, appears not to be correct. In Ware *v.* Johnson, 2 Sir Geo. Lee's Cas. in Eccl. Co'ts, 103 (A. D. 1755), the words, "He keeps a whore in his house," were held to be defamation, and that whether the language was in writing or by parol. And see 2 Phil. Eccl. Cas. 106.

[2] "It is said that formerly no actions were brought for words unless the slander was such as, if true, would endanger the life of the object of it. (Noy, 64; 1 Freem. 277.) But too great an encouragement being given by this lenity to false and ma-

and reliance have to be placed by men each in the integrity of the other, so increases the power to inflict pecuniary injury by means of language. The theory of the law being to redress all wrongs by a pecuniary fine, whenever it appeared that a pecuniary wrong was occasioned by language, there the temporal courts undertook to afford redress. It may be that at first, in all cases, in order to maintain an action for words in the temporal courts, it was necessary to prove a pecuniary loss; but those courts, by laying it down as a rule of evidence, that certain words *per se*, and without any further evidence, were proof of pecuniary loss, facilitated a resort to the temporal courts, and, by gradually extending the list of words which were regarded *per se* as evidence of pecuniary loss, so did those courts extend their jurisdiction. Thus, probably, originated the distinction between words actionable *per se* and words actionable only on proof by other evidence than the words themselves of pecuniary loss. It is supposed that formerly the English law recognized no distinction between the effect of written and spoken words. When or why that distinction was introduced is unknown. It may well be that the desire of the temporal courts to enlarge their jurisdiction led them to adopt this distinction, a distinction for which they found some warrant in the Roman law.[1]

§ 57. We attempted to explain in Chapter II, the

licious slanders, it is now held that for scandalous words of the species before mentioned (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust), an action on the case may be had without proving any particular damage to have happened, but merely upon the probability that it might happen. (3 Bl. Com. ch. viii.)

[1] See note , p. 67, *ante*. Daniel O'Connell, in 1834, proposed a bill in the English Parliament intended, amongst other things, to assimilate libel to slander as to what language should give a right of action. See this bill commented upon, XI London Law Mag. 432.

difference between an injury to reputation and an injury to property; and to show that an injury to the reputation did not necessarily imply an injury to the person or property. In Chapter III, we undertook to show that reputation was not an *absolute right*, and in the preceding portion of this chapter we have attempted to show that the temporal courts of common law only recognized injuries involving pecuniary or temporal loss. It nowhere appears that the temporal courts recognized any right to reputation, and it is entirely consistent with all our knowledge of the law to assert that, *in theory* at least, the temporal courts of England never did, and, as the law in this respect has not been changed, they do not now, recognize reputation as a right which the law protects. And if this be so in England, then is it so in the United States. When we consider that "falsely and maliciously to impute, in the coarsest terms and on the most public occasion, want of chastity to a woman of high station and unspotted character, or want of veracity or courage to a gentleman of undoubted honesty and honor, cannot be made the foundation of any proceeding civil or criminal; whereas an action may be maintained for saying that a cobbler is unskillful in mending shoes, or that any one has held up his hand in a threatening posture to another,"[1] it would seem to need nothing more to satisfy the most skeptical that the protection is to the property, and not to the reputation. We conclude, therefore, to state as law, that pecuniary loss to the plaintiff is the gist of the action for slander or libel. If the language published has not occasioned the plaintiff pecuniary loss (actual or implied), then no action can be maintained.[2]

[1] Report of Committee of House of Lords on Defamation and Libel, July, 1843.

[2] In a note to the "Preliminary Discourse" to the American edition of Starkie on Slander, a ter referring to the Roman law as making *personal contumely and insult* the essence of the offence of slander, adds: "This, it will be seen, is a circumstance which constitutes a very essential and characteristic distinction between the law of England and that of Rome, and of those countries which have adopted the civil law:

Let us not be misunderstood. We concede all that can be urged as to the value of a "*good reputation.*" We believe, with Lord Bacon, that "men's reputations are

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* * * for the law of England has from very distant times considered the *temporal injury* to a man's estate, and not the contumely or insult of the agent as the ground of compelling reparation in damages." (Prelim. Disc. vii.) "There must be some certain or probable temporal loss or damage to make words actionable;" this was said of *oral* words by De Gray, C. J., in Onslow *v.* Horne, 3 Wils. 177, and this was approved by Lawrence, J., in Holt *v.* Scholefield, 6 T. R. 691. And *per* Bayley, J., in Whittaker *v.* Bradley, 7 D. & R. 649: "The principle on which this species of action (action for saying orally plaintiff, an innkeeper, was a bankrupt) is, that the slander has the effect of producing *temporal* damage to the party complaining." To maintain the action there must be *injury* to the plaintiff. (Ellenborough, Ch. J., Maitland *v.* Goldney, 2 East, 426.) An action on the case is not maintainable in any case without showing especial prejudice. (Lowe *v.* Harwood, Cro. Car. 140 S. C.; Palmer, 529; Ley, 82.)

Reputation or fame is under the protection of the law, because all persons have an interest in their good name, and scandal and defamation are injurious to it, though defamatory words are not actionable otherwise than as they are a damage to the estate of the person injured. (Wood's Ins. 37; Jacob's Law Dict. *voce* Reputation or Fame.) An action on the case lies for words and for deeds. For words spoken to or concerning another, whereby one is defamed and damnified. (2 Wood's Ins. 927.) "One essential ingredient of a good cause of action for defamation is damage." (Channell, B., Foulger *v.* Newcomb, Law Rep. II Ex. 330.) Reputation is property. (Dixon *v.* Holden, Law Rep. VII Eq. 492.)

"In England, by the common law, defamatory words are not actionable, otherwise than as they are a damage to the estate of the person injured." (Wood's Civil Law, 244, note.) "I am not certain," says Lord Kames, "that in England any verbal injury is actionable, except such as may be attended with pecuniary loss or damage. *If not, we in Scotland are more delicate.* Scandal, or any imputation upon a man's good name, may be sued before the commissaries, even when the scandal is of such a nature that it cannot be the occasion of any pecuniary loss. It is sufficient to say, I am hurt in my character." (Historical Law Tracts, p. 225.)

"The party injured [by libel] may no doubt bring an action on the case. This process, however, is not competent unless it is grounded on an actual loss, which must be shown to have been sustained." (Borthwick on Libel, 4.) In Boldroe *v.* Porter, Yelv. 20, the declaration alleged *per quod* the plaintiff was in danger to lose her goods and life. In Edward's Case, Cro. Eliz. 6, held the charge actionable, and assigned as the reason, that "*by such speech the plaintiff's good name is impaired.*" In Button *v.* Heywood, 8 Mod. 24, Fortescue, J., observed: "It was the rule of Holt, Ch. J., to make words actionable whenever they sound to the *disreputation of the person* of whom they were spoken, and this was also Hale's and Twisden's rule, and I think it a very good rule."

"I will cite rights to forbearances merely. A man's right or interest in his good name is a right which avails against persons as considered generally and indeterminately. They are bound to forbear from such imputations against him as would amount to injuries towards his right in his reputation. But though the right is a *real* right, there is no subject, thing, or person over which it can be said to exist. If the right

tender things, and ought to be like Christ's coat, without seam."[1] And "who can see worse days than he that, yet living, doth follow in the funeral of his own reputation." We do not intend to deny that the law does in fact, and to a great extent, protect reputation; but we intend to be understood as insisting that, where the law does protect reputation, it does so indirectly, by means of a fiction—an assumption of pecuniary loss. In theory, the action for slander or libel is always for the pecuniary injury, and not for the injury to the reputation. There are many such fictions introduced into the administration of the law, by means of which, without changing the rule of law, the law is, in effect, changed.[2] When this is the case, this difficulty arises: Shall the rule be stated as it is in theory or as it is in effect? and then this further difficulty, that these two phases of the same rule are sometimes stated as two distinct rules, and the rule being stated sometimes one way and sometimes the other, creates confusion and apparent contradiction. It may be that practically it is the same thing, whether the remedy is given by law for the injury to the reputation, or for the pecuniary injury by means of an attack on the reputation; but in reasoning on this, as on any other subject, it makes all the difference whether we start with a true proposition, or a false one. With a false premise we *may* arrive at a conclusion which is

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has any subject, its subject consists of the contingent advantages which he may possibly derive from the approbation of others. (2 Austin's Lect. Juris. 51.) Right to reputation may be classed with property. It is a right to the chance of the favorable opinion and the good offices of others. There is no obligation to do me good, but an obligation to forbear from lessening the chance of deriving good from voluntary service, &c. (2 *Id.* 479, and 3 *id.* 179, 184.)

[1] Lord Bacon's charge against Lumsden. Good reputation has ever been, as it is now, of great value as a shield against imputation of crime; by a law of William the Conqueror, if a man of good reputation was charged with theft, he might clear himself by his single oath. (Leges Gul. Conq. 14, in the Ancient Laws and Institutes published by the English Record Commissioners. See Anthon's Law Student, Thesis X: Character, how far a Universal Shield. Also, McNally's Crim. Ed. 573.)

[2] See Maine's Ancient Law, 26, and Bryant *v.* Foot, Law Rep. II Q. B 181.

true; but we can never, under such circumstances, be sure that our conclusion is true.

§ 58. Among the fictions referred to in the last preceding section, perhaps the most noticeable, and the one which best illustrates our meaning, is that by which more than nominal damages are recovered by a parent for the seduction of a daughter. At the present day, no lawyer doubts that at common law no action could be maintained for the seduction of a daughter, merely as a daughter, nor merely for the seduction. But at common law, to deprive one of the services of his hired servant gave a cause of action, because it occasioned a pecuniary injury. The common law gave a parent a right to the services of his minor children; then, in order to afford a remedy for seduction, which was not contemplated by the common law, the daughter is styled servant, and the remedy is given in theory, not for the grief and shame of the seduction, but because, by means of the seduction, the servant was the less able to perform the services required of her, and the parent thereby sustained a pecuniary loss.[1] This was the first step; and where the daughter was, in fact, one of the parent's household, the change from the *status* of daughter to that of servant was easy enough. The next step was where the infant daughter was not in fact one of the parent's household, but was in the service of another, by her own contract, and not by the contract of the parent; then the action was allowed on these grounds: the daughter, being an infant, could not lawfully contract for her services, therefore the parent could at will rescind the contract, and take the daughter to the parental service; but if the parent did so, the servant would be less

[1] There can be no doubt that the law is as above stated (Knight *v.* Wilcox, 14 N. Y. 413); and yet it is but candid to say that there are *dicta* to the effect that the mortification and disgrace and wounded feelings constitute the *gravamen* of the action. See Badgley *v.* Decker, 44 Barb. 577, and cases there cited.

efficient, and so a pecuniary injury might or did result. The next and final step thus far is, that where the infant daughter was, by the contract of the parent, the servant of another, still the action can be maintained if the seducer by his fraud had procured the making of the contract, and this on the ground that the fraud vitiated the contract, and leaves the parent an option to reclaim the daughter's services.[1]

§ 59. By similar processes to those detailed in the last preceding section it has come to pass that the remedy for injuries by language, in theory given only to redress a pecuniary loss, is now applied to and embraces cases in which no pecuniary loss is or can be shown to have occurred. The process by which this result has been arrived at is, by adopting the rule of evidence above referred to (§ 56), that certain language is *per se*, and without other evidence, conclusive proof of pecuniary loss; this, however, is only a rule of evidence, and the rule of right remains intact—that a pecuniary loss must be shown to entitle a remedy. That the rule is so is demonstrated by the case of words to which the rule of evidence just referred to does not apply, or to words which are said not to be actionable *per se*—that is, which are not *per se* evidence of pecuniary loss. As to these, it has never been doubted that a pecuniary loss must be shown to entitle the plaintiff to a remedy.[2]

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[1] See Lipe *v.* Eisenlerd, 32 N. Y. 229; White *v.* Nellis, 31 N. Y. 405; Dain *v.* Wyckoff, 18 N. Y. 45; s. c. 7 N. Y. 191; Mulvehall *v.* Milward, 11 N. Y. 343; Bartley *v.* Richtmeyer, 4 N. Y. 38; Knight *v.* Wilcox, 14 N. Y. 413; Harper *v.* Luffkin, 7 B. & C. 387; 1 M. & R. 166. This last case is a noticeable instance of how far courts will in effect depart from the rule of law, while they uphold it in the letter.

[2] Beach *v.* Ranney, 2 Hill, 309; Herrick *v.* Lapham, 10 Johns. 291; Hallock *v.* Miller, 2 Barb. 630; Hersh *v.* Ringwalt, 3 Yeates, 508. "The real foundation of the action [for libel] is the right to recover pecuniary satisfaction." (Viele *v.* Gray, 10 Abb. Pr. R. 7.) The special damage must be of a pecuniary nature. (Beach *v.* Ranney, 2 Hill, 309.) And see *ante* note to § 57, and *post* note to § 72; Heard on Libel, ch. v, § 54, Kelly *v.* Partington, 3 Nev. & M. 116; 5 B. & Ad. 645; Keenholts *v.* Decker, 3 Denio, 346; Foulger *v.* Newcomb, Law Rep. II Ex. 330; Terwilliger *v.* Wands, 17 N. Y. 62; Wilson *v.* Goit, 17 N. Y. 444; Roberts *v.* Roberts, 33 Law Jour. Q. B. 250.

CHAPTER V.

WRONGFUL ACTS. ELEMENTS OF A WRONG.

Wrongful Acts—Liability—Presumptions of Law—Questions of Law and Fact—Essential acts in Slander and Libel—Defamatory—Falsity—Voluntary—Involuntary—Intention—Malice.

§ 60. Although we are unable to predicate of any act *per se* whether or not it is *a wrong* (§ 51), we may, at least as to some acts, determine of them *per se* whether or not they are *wrongful.*

§ 61. An act is wrongful which, as a necessary or as a natural and proximate consequence, occasions hurt of body or pecuniary loss to another than the actor.[1] When the necessary consequences of the act *must* be hurt of body or pecuniary loss, then the act is patently wrongful, or wrongful *per se.* When the act is one the consequences of which are not necessarily hurtful to the person or property of another, but is an act the natural and proximate consequences of which *may* occasion hurt to the person or property of another, then it is latently wrongful. It is wrongful, provided that as a natural and proximate consequence there ensues personal hurt or pecuniary loss to another. One and the same act may occasion harm to the person and loss of property of another, and either by its necessary or its natural and proximate consequences, or both. It is not always easy to determine what are necessary and natural and proxi-

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[1] *Bonomi* v. *Buckhouse.* 9 Ho. Lords' Cas. 503; *Smith* v. *Thackerah,* Law Rep. 1 C. P. 566.

mate consequences, and to distinguish them from those which are not necessary, not natural, or not proximate (*remote*) consequences. The rules for making this determination and distinction will be hereafter considered. We have here but to remark that the necessary, natural, and proximate consequences of an act are those of which alone the law takes cognizance, and these it is which constitute in legal phraseology damage or injury. Any consequence which is neither necessary nor natural and proximate is disregarded in law.

§ 62. No act, but a wrongful act, can become a wrong; but every wrongful act, in the absence of any excuse for it being shown, is *prima facie* a wrong. It is a wrong provisionally or conditionally; that is to say, it is regarded for *all purposes* as a wrong, unless and until a legal excuse for the doing it is shown. That which does not exist and that which is not shown to exist are the same. A legal excuse not shown to exist is the same as though no legal excuse existed. The burden of showing the existence of a legal excuse or a defence is always upon the doer of the wrongful act.

§ 63. Anything which must be shown to establish a legal excuse or a defence is no part of the essential element of a wrong. In practice, to entitle to a remedy, it is required only to show a wrongful act done, and nothing more appearing, the right to the remedy follows as of course. Reason and expediency alike demand that in this respect the theory should correspond to the practice.

§ 64. Legal excuses are of two kinds—such as constitute an absolute bar or defence to the act, or such as constitute a conditional defence. A legal excuse of the latter kind is a defence, until some additional fact is shown which takes from it the character of a legal excuse. The legal excuse that the language was spoken by a judge as

such, or by a witness as such, is of the first or absolute kind. The legal excuse that the language was published to one who was interested to know it and with a belief that it was true is a legal excuse of the second or qualified kind. The excuse exists only provided it does not appear that the language was published not believing it to be true, or published to one not interested to know it.

§ 65. There is this distinction between *legal excuse* and defence. Legal excuse is such a state of facts as prevents a wrongful act amounting to a wrong. Defence includes legal excuse and more; namely, those cases in which the wrong is admitted to have been done, but where, from some circumstance, such as the statute of limitations, or satisfaction, or in the action for libel the truth of the language published, the plaintiff has forfeited or waived his right of action.

§ 66. The question what constitutes a wrong or when has a wrong been committed, and the question who is liable therefor, are essentially distinct questions, and to be determined by different rules.

§ 67. As regards liability, no one is responsible for involuntary acts,[1] nor for any other than *wrongful*

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[1] A man must will an act before he can be responsible for it. (Wood's Civil Law, 18.) No action lies for an inevitable accident. (Harvey *v.* Dunlop, Hill & Denio, Sup. 193; see Center *v.* Finney, 17 Barb. 94, affirmed 2 Selden's notes, 44.) No man is liable civilly or criminally for a purely accidental mischief; that is to say, for the consequences of an act not his own which he was unable to foresee, or, foreseeing, was unable to prevent. (2 Austin's Lect. Juris. 165, 167.) The act must be intentionally done; the meaning of which is, that the defendant should know what he published, for, as in the case put by Starkie, if a servant should deliver a sealed letter containing the defamatory matter without knowing its contents, he would not, though the actual instrument of publication, be liable to an action. (Daly. F. J., Viele *v.* Gray, 10 Abb. Pr. R. 7; 18 How. Pr. R. 550.) If published inadvertently it would not be a libel. (Rex *v.* Abingdon, 1 Esp. Cas. 228.) Being the sale of a few copies of a periodical journal containing the libel, it was for the jury to say if the defendants were cognizant of what they sold. (Chubb *v.* Flannagan, 6 C. & P. 431.) Since intention and will are essential to every act, and intention, will, and malice to every

acts (§ 62). All who without legal excuse concur in a wrongful act are alike liable either jointly or separately. No one can excuse his concurrence in a wrongful act merely on the ground that in what he did he acted as agent for another.[1] It sometimes happens that those who are in no wise concerned in the actual doing of a wrongful act, or a wrong, are nevertheless liable therefor; this, be it observed, is *not on account of any presumed connection with the act*, but because under the circumstances they are legally responsible for the acts of the actual wrongdoers.[2] It may also occur that the one who actually does the act may not be liable, while for that same act another may be liable.[3]

§ 68. The proposition that one is liable for his wrongful act implies, in terms, liability for the necessary, natural, and proximate consequences of the act. This leaves no room for any question as to the intent with which the act is done. There may or may not be any intent, good or bad; but intent or no intent, the liability is for the act and its consequences, not for the intent. By the law of England intent alone, without any overt act, may constitute treason, with this exception there is no case in which intent alone, without an act, can constitute a wrong. The *prima facie* liability for the commission of a wrongful act can be avoided only by showing some defence or lawful excuse. Showing the act to have been done with

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crime, the absence of any intention or will will prevent any occurrence from being an action, and the absence of malice * * * will prevent any action from being a crime. (Stephen's Crim. Law, 85.)

[1] "There are no agencies in crime." (E. Darwin Smith, J., Lowenstein *v.* The People, 54 Barb. 305.) If a person does an act with a guilty intent, he is not the agent of any one. If he does it innocently, he is the agent of some person or persons, and if two have agreed to employ him, he is the agent of both. Alderson, B., Reg. *v.* Bull, 7 Law Times, 8; and see Moloney *v.* Bartlett, 3 Camp. 210; Hecker *v.* De Groot, 15 How. Pr. R. 314, and *post*, §§ 265–7.

[2] See *post*, Publisher.

[3] See *ante*, note to § 67, and *post*, Publisher, § 121.

a good intent would not of itself, in any case, constitute a defence or lawful excuse. The consequences of an act are incidents to the act, and inseparable from the act. Liability for the one is inseparable from liability for the other. The usual ground upon which this liability for the consequences of an act is placed is, that the law presumes every one to intend the necessary and natural consequences of his acts.[1] The phrase, *the law presumes*, is objectionable. The law does not presume.[2] It is customary to say that the law presumes every one innocent; every one of good repute; every wrongful act to be malicious; every one to intend the consequences of his acts, &c. But it is not so. If one is accused of wrong, the law requires proof of his guilt; not because it presumes him innocent, but because it does not presume him guilty, and requires the fact to be proved. One complaining of injury to his reputation is not excused from proving his reputation to be good because the law presumes his reputation to be good, but because the law does not presume it bad. On proof of a

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[1] The law presumes a party to intend the injury his acts are calculated to produce. (Haire *v.* Wilson, 9 B. & Cr. 643; Viele *v.* Gray, 10 Abb. Pr. R. 7, and series of dicta.) A man is as much answerable for the probable consequences of his act as for the actual object. (Rex *v.* Moore, 3 B. & A. 184.) "It is a universal principle that when a man is charged with doing an act (that is a wrongful act without any legal justification) of which the probable consequences may be highly injurious, the intention is an inference of law resulting from the doing the act." (Rex *v.* Dixon, 3 M. & S. 15; cited Reg. *v.* Hicklin, Law Rep. III Q. B. 375.

[2] We are not unmindful of the fact that the books are full of such expressions, as the law presumes, presumption of law, &c. But the phrase is objectionable and should be reformed. Burrill says the presumption is rather an assumption. (Presump. Ev. 10, 43; and see 6 Lond. Law Mag., 354.) The inference, for it is absurd to call it a presumption. (Stephen's Crim. Law, 182.) "Presumptions of fact are but inferences drawn from other facts." (Mason, J., O'Gara *v.* Eisenlohr, 7 Trans. App. 317.) Distinction between presumption of evidence and presumption of law, see The People *v.* McCann, 16 N. Y. 66; Powell *v.* Cleaver, 2 Brown Ch. R. 499. Presumptions are not based on the supposition that the fact presumed exists, but because the policy of the law requires such a presumption. (Doe *v.* Earnhart, 10 Iredell's Law Rep. 516.) Presumption "is the inference of one fact from another." (Duncan *v.* Little, 2 Bibb, 426.) Counsel: It must be assumed that the trustee will do his duty. (Pollock, Ch. B.) We must assume nothing either way, but he may not. (Bulnois *v.* Mann, Law Reports I, Ex. 30.)

wrongful act the law will punish it as a wrong, not because it presumes the act to be malicious, but because it does not presume there was any legal excuse for doing the act. An act being wrongful is *prima facie* a wrong, and if it is not, the burden of showing the legal excuse to exist is on the actor, or whoever is liable for the act. One is liable for the consequences of his acts because the law will not presume the actor intended any other than the consequences of his act, not because the law presumes any intention. It would be as illogical and unfair to presume that one did not intend to do exactly what he has done, as it would be unwise to allow one to say he did not intend to effect the necessary and natural consequences of his acts.

§ 69. In every transaction brought before a court of law for adjudication two questions always arise: (1) what are the facts, and (2) what is the law applicable to those facts? The court always decides the questions of law. Some questions of fact are decided by the court, and some by the jury.[1] Courts control the decisions of juries on questions of fact.[2] (1) By determining whether or not

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[1] For twelve honest men have decided the cause
Who are judges alike of the facts and the laws.

From a political ballad by Alderman Glover, called "Hosier's Ghost." In "Political Ballads of the 17th and 18th Centuries," by W. Walker Wilkins, London, 1860; also to be found in a work entitled "England under the House of Hanover," by Wright. On the motion for a new trial in the case of the Dean of St. Asaph, (3 T. R. 428, *note*,) Lord Mansfield cited the above lines as thus:

For twelve honest men have decided the cause
Who are judges of facts, though not judges of laws.

He attributed the authorship to Mr. Pulteny, and as written on the occasion of the failure of the prosecution against "The Craftsman." (See 21 State Trials, 847, 1046; 17 *id.* 625; Forsyth's Hist. of Trial by Jury, 272.) Lord Campbell in his Lives of the Chancellors (vol. VI, p. 176, Life of Lord Hardwicke) attributes this ballad to Pulteny—The Percy Anecdotes (Anecdotes of Imagination) not only give Alderman Glover as the author, but mention the circumstances under which it was composed, while the author was on a visit at the house of Lady Temple.

[2] The judge put back the jury twice because they offered their verdict contrary to their evidence. (Clayton, 50.) Instances of judges taking questions of fact out

the evidence adduced tends any way to prove the fact in issue; whether there is *some* evidence or *no* evidence. (2) By deciding in some cases that certain established facts warrant or do not warrant certain inferences, and requiring the jury to accept such inferences as proved. (3) By deciding what evidence is to be regarded, and what disregarded, whether as going to prove or disprove a fact, or to affect damages. (4) By granting new trials when they deem the verdict as contrary to or as against evidence, or the damages excessive or inadequate. The connection between one fact and another, as cause and effect, is always a question of fact. It is the degree of probability of such connection which leads courts to determine whether they decide the question, or whether they leave it to the jury to decide. (1) If one event is very generally the cause of a certain other event, the courts lay down the general rule that the proof of the one event is the proof of the other, and do not allow juries to decide contrariwise. (2) If one event is often but not so generally the cause of a certain other event, then the courts leave it to the jury in each case to decide whether or not in that particular case that certain other event has followed.

The necessary consequences of an act always follow the act, and therefore the courts pronounce it a rule of evidence that the proof of the act is proof of its necessary consequences, and the jury may not find otherwise. The natural and proximate consequences of an act do often, but not always, follow the act; therefore the jury decide in each case whether or not those consequences have followed in that particular case.

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of hands of jury. (Wright *v.* Orient Mut. Ins. Co., 6 Bosw. 269; Wells *v.* Com. Mut. Ins. Co., 46 Barb. 413; Clarke *v.* Rankin, 46 Barb. 571, and numerous cases.) Juries are *assistants* to the courts in determining *some* issues of fact. (Forsyth's Hist. Trial by Jury.) In Vermont *by statute* the courts are forbidden to grant new trials because they differ from the jury as to the weight of testimony. (Stearns *v.* Howe, 12 Verm. 579.)

§ 70. In every slander there are two acts, (1) the composing, and (2) the publishing. In every libel there are three acts: (1) the composing, (2) the writing, and (3) the publishing. The act which is the essential element in the wrongs, slander and libel, is a wrongful publication of language (§ 23), and the general prohibition (§ 49) as applicable to those wrongs would be: *No one shall, without legal excuse, publish language concerning another or his affairs which shall occasion him damage.* In other words: *Every publication of language concerning a man or his affairs, which, as a necessary or natural and proximate consequence occasions pecuniary loss to him, is prima facie a slander or a libel*—a slander, if the publication be oral; a libel, if the publication be by writing. This, it must be remembered, is not a description, much less a definition of a slander or a libel, but merely a description of what is *prima facie* a slander or a libel.

§ 71. In describing or defining a slander or a libel, it is customary to enumerate among its requisites (1) that the language must be defamatory, (2) false, and (3) that the publication must be with malice, or made maliciously. We shall endeavor to give sufficient reasons for omitting these three *supposed* requisites from our description.

§ 72. To constitute a slander or libel must the language be defamatory? This question suggests others: What is meant by defamatory? Does defamatory mean more than discommendatory? It appears to us that to say the language must be defamatory, is only stating a portion of what is implied in saying that it must be such language as by a necessary or natural and proximate consequence occasions pecuniary loss to him whom, or whose affairs, it concerns. It is scarcely conceivable that any other than discommendatory language can by a necessary or natural and proximate consequence occasion damage; it may therefore not be improper to say that the language

must be defamatory, but that alone does not express so much as is implied in the requisite of occasioning *damage*. We shall hereafter have occasion to advert to this subject more in detail.[1]

§ 73. To constitute a slander or libel must the language be false? If the language is true, it is a defence;[2] but it does not thence follow that falsity is an essential element of the wrong. We know that the fact of the language being true is not alone an answer to a prosecution for a libel as a public offence; the fact, then, of the language being true does not prevent its amounting to a wrong (§ 43). To say that showing the truth of the language published is a defence, and to say the language must be false, are not identical propositions. It may be correct to say one has the right to *speak* the truth,[3] but it is not correct to say one has the right to publish the truth by writing (§ 43). In certain cases, as will hereafter be explained, a cause of action for slander or libel can not be shown without alleging the language to be false; but in the ordinary case of language concerning the person, no allegation of falsity is required to show a cause of action. In the latter instance the allegation of falsity is not necessary in a civil action, nor even in a criminal prosecution.[4]

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[1] "But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory." (Patteson, J., Kelly *v.* Partington, 5 B. & Ad. 645; 3 Nev. & M. 116; and to the same effect see Vicars *v.* Wilcocks, 1 East, 1; Ashley *v.* Harrison, 1 Esp. 48; Peake, 194.) "We cannot have a definite idea of a design to injure unconnected with some degree of probability that the means made use of would effect the design." (Durham *v.* Musselman, 2 Blackf. 99.)

[2] "The truth of the supposed slander is in effect a ground of justification, which must be substantiated by the defendant." (1 Starkie on Libel, 9.) To maintain the action, the words should be untrue. (Ellenborough, Ch. J., Maitland *v.* Goldney, 2 East, 426.)

[3] "Our laws allow a man to speak the truth, although it be done maliciously." (Bronson, J., Baum *v.* Clause, 5 Hill, 199; and to the like effect, Foss *v.* Hildreth, 10 Allen, 76.)

[4] Rex *v.* Burke, 7 T. R. 4, and if falsity is alleged, it cannot be traversed (Lewis *v.* Allcock, 3 M. & W. 188; 6 Dowl. Pr. C. 389) and *post, Pleading*.

But where, as often happens, the language is alleged to be concerning the person and also concerning the affairs, then the allegation of falsity becomes material. The approved precedents of pleadings all contain the allegation of falsity, and thus, probably, falsity has come to be regarded as essential to the wrongs and to the descriptions of the wrongs slander and libel.

In those cases in which falsity must be alleged to show a cause of action, then the language cannot, as a necessary or natural and proximate consequence, occasion a pecuniary loss unless it is false; *in such cases, therefore, if not in every case,* the requirement that the publication must, as a necessary or natural and proximate consequence, occasion pecuniary loss, includes the requirement that the language be false. As will appear hereafter, where the language is concerning the person, the plaintiff is not allowed in the first instance, nor, except to disprove a defence of truth, to give any evidence of the falsity of the language published.[1]

§ 74. To constitute a slander or libel must the publication of the language be with malice or maliciously? To answer this question it is material to inquire *what is malice, and what is meant by the term malice as used* in the text-books and the reports.[2]

§ 75. We have seen that every act must be lawful or unlawful (§ 42). Lawful, such as has a legal excuse; unlawful, such as has not a legal excuse. Acts done without lawful excuse are said to be done with malice or to be malicious acts. All acts, whether lawful or unlawful, must be voluntary or involuntary.[3]

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[1] 2 Starkie on Libel, 59; Stuart *v.* Lovell, 2 Starkie's Cas. 93.

[2] How much bad law and bad philosophy of law have arisen from imperfect comprehension of the terms will, motive, intention and negligence, may be seen in the nonsense of English law writers concerning malice. (Edinburgh Review, Oct., 1863, p. 230, Amer. Reprint.)

[3] "I purposely abstain from the use of the words *voluntary* and *involuntary*, on ac-

§ 76. A voluntary act is an act done under no legal or other obligation to perform it, and which the actor may do or forbear at his option, as an act done in the exercise of a right. An act done with a consciousness or knowledge of the character of the act, or under such circumstances as that the actor ought to know, and by the exercise of a degree of care proportionate to the exigencies of the occasion the actor might know, the character of the act. A voluntary act does not mean a mere act of volition, but an act of volition coupled with a means of knowing the character of the act about to be performed, and an intention to do that very act.[1] It is the act sometimes called an intentional act. Every act is *prima facie*, and without more, a voluntary act; it is regarded for all purposes as a voluntary act unless and until it is shown to be involuntary.[2]

§ 77. An involuntary act is an act done under circumstances which permit to the actor no option as to whether he will do or forbear the act; an act done under some legal obligation to perform it as an act done in discharge of a duty; an act done under duress; an act done unconsciously and without knowledge as to the character of the act, the unconsciousness not being self-imposed; and the act done without the opportunity, by the exercise of a degree of care proportioned to the exigency of the occasion, of knowing the character of the act.

§ 78. Besides, and in addition to the intention of per-

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count of the extreme ambiguity of their signification. By a voluntary act is meant sometimes an act in the performance of which the will has had any concern at all—in this sense, it is synonymous to '*intentional*'—sometimes it means uncoerced, and sometimes spontaneous." (Bentham's Principles of Morals and Legislation, 22, 79, 81, and see 2 Austin's Lect. Juris. 88.)

[1] "An act of the will is the same as an act of choosing or choice." (Edwards on the Will, pt. 1, § 1; commented on Hazard on the Will, 177.) As to will and intention, see Stephen's Crim. Law, 76.

[2] "Men do not act wholly without motive." (Woodruff, J., Kenedy *v.* The People, 39 N. Y., 254.)

forming any act, there may be an intention in the mind of the actor to accomplish, by means of the act done, certain ends, or to produce certain consequences. Passing over the metaphysical distinctions between *will* and *intent* we may draw a distinct line of demarkation between the intent *to do an act* and the intent *to produce the consequences of the act.* This line we draw.

§ 79. Intent may or may not, in fact, be synonymous with *motive*, but we desire it understood that we use intent and motive as synonymous. By intent we mean motive, and if the term motive be employed instead of intent, it must be divided as we have divided intent, and a distinction observed between the motive for doing the act and the motive to produce the consequences of the act. The intent or motive which goes towards the doing the act we include in the term voluntary. The intent or motive which refers to the consequences of the act we denominate intent or intention.

§ 80. A voluntary act may be done without any intent to produce its consequences, and an involuntary act may be done with an intent to produce its consequences.[1] In the cases in which there exists any intent to do more than commit the act itself, the intent may be either to produce all or some of the consequences of the act, or to produce an effect not a consequence of the act done. As

[1] "Nor does the nature of the resulting effect make any difference to the moral quality or character of the effort. A man's intentions may be most virtuous, and yet the actual consequences of his efforts be most pernicious. * * The moral nature of the volition is not, then, in any way affected by what actually follows that volition." (Hazard on the Will, 154.) "Feeling that *will implies intention*, numerous writers on jurisprudence employ *will* and *intention* as synonymous. They forget that *intention does not imply will.* * * * The agent may not intend a consequence of his act. In other words, when the agent wills the act, he may not contemplate the given event as a consequence of the act which he wills." (2 Austin's Lect. Juris. 94.) "It is perfectly manifest that badness or goodness cannot be affirmed of the will, and that a criminal intention may accord with a good disposition." (*Id.* 133.)

one is responsible only for the necessary and natural and proximate consequences of his acts, at least any intent to produce any other consequence or effect must be immaterial. If the intent is at all material, it must be the intent to produce the necessary and natural and proximate consequences of the act.

§ 81. The various kinds of intents with which an act may be done are all resolvable into two classes, (1) an intent to injure some one, (2) an intent to benefit some one. The one to be injured or benefited may be the actor or some other. One and the same act may be done with an intent to injure one and benefit another.

§ 82. Intent may be divided into *general* and *particular*. Particular intent, or the intent with which any certain act may be done, is to be distinguished from the general intent. One may have a general intent to injure or benefit another, and synchronously with that intent may do some act concerning that other without any reference to the general intent, or without any particular intent, or with a particular intent different from or contradictory to the general intent. As a question of probability, the particular intent will follow the general, but not necessarily so; whether it does or does not is in every case a question of evidence.

§ 83. Intent or intention is a mental conception—an existence. It is a fact,[1] impalpable, intangible, invisible,

[1] The existence of mind is as much a matter of fact as the existence of matter. (Elementary Sketches of Moral Philosophy, by Sidney Smith, Introductory Lecture.) Intention is a fact. (Clift *v.* White, 12 N. Y. 538.) A witness may be asked with what *intent* he did an act. (Seymour *v.* Wilson, 14 N. Y. 567; Griffin *v.* Marquardt, 21 N. Y. 121; Forbes *v.* Waller, 25 N. Y. 439.) But his evidence is not conclusive. (Griffin *v.* Marquardt, 21 N. Y. 121; Thurston *v.* Cornell, 38 N. Y. 287; Foster *v.* Cronkhite, 35 N. Y. 147.) And it seems this question is not permissible in certain cases, as where the intent may be or must be inferred from the act. (The People *v.* Saxton, 22 N. Y. 309: Shaw *v.* Stine, 8 Bosw. 161; Ballard *v.* Lockwood, 1 Daly, 164.) We are not aware of the right to put the question as to intent having been

but nevertheless a fact. The existence or non-existence of an intent or an intention and its character are always questions of fact. Save the declarations of the individual in whose mind the intent is supposed to exist, we can have no *direct* testimony as to the existence or non-existence of any intent, or its character. Save such declarations we can have none but *indirect* testimony. That indirect testimony is the inference we may draw from his acts.[1]

§ 84. Not technically, but in reality, when the intent is to injure it is a *bad intent*, and bad intent is *malice*.[2] The act by means of which a bad intent is sought to be realized is a *malicious act*, and the act is done *maliciously*.

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mooted in an action for slander or libel. We suppose it could not properly be put in any action for slander or libel, because we are of opinion the question of mere intent can never be material in those actions. But assuming that intent is or may be material, then the question might be put in connection with a state of facts which discloses a qualified legal excuse. In our opinion, the decisions show the rule to be: you may inquire into the intent, directly, as by inquiring of the party, in cases where the intent is material, and the act complained of is as consistent with a good intent as with a bad intent, but in no other cases. (See *supra*, and Booth *v.* Sweezy, 8 N. Y. 281; Ellis *v.* The People, 21 How. Pr. R. 356; Powis *v.* Smith, 5 B. & A. 850.) "Because," says Mr. Erskine (Inst. iv, 4, 80), "the intention of the defender cannot always be known with certainty, in the trial of this crime (verbal injury), doctors are generally of opinion that his oath in supplement may, in doubtful cases, be admitted towards his exculpation." (Borthwick on Libel, 172, note.)

[1] The state of a man's mind can only be known by others through his acts, through his own declarations, or through other conduct of his own. (2 Austin's Lect. Juris. 106; Fisk *v.* Chester, 8 Gray, 508.) Previous intentions are judged by subsequent acts. (Dumont *v.* Smith, 4 Denio, 319, 320.) The intention of an act done must be judged by its necessary consequences. Where these are directly pernicious the intent to work mischief becomes a conclusion of law. (Safford *v.* Wyckoff, 1 Hill, 11, referring to Reg. *v.* Boardman, 2 Moo. & Rob. 147, 148.) Where the guilt or innocence of the act depends upon the motive of the actor, his conduct and declarations as to other similar transactions about the same time are always admissible to show it. (Barren *v.* Mason, 31 Verm. (2 Shaw) 189; Scanlan *v.* Cowley, 2 Hilton, 489; Center *v.* Spring, 2 Clarke (Iowa), 393.)

[2] "Hardly any word in the whole range of the criminal law has been used in such various and conflicting senses, nor is there any which it is more important to understand correctly." (Stephen's Crim. Law, 81.) The etymological meaning of the words malice and malicious is simply wickedness and wicked (*id.* 82), and it will be found in practice impossible to attach to these terms any other meaning. (*Id.*) "I

§ 85. Upon reference to the text-books and reports to discover the meaning *in use* of the terms intent[1] and malice we find:

§ 86. As respects the term *intent*, it is sometimes employed to signify done intentionally, and in that sense is equivalent to will, or to what we have designated voluntary; sometimes employed to signify an intent to produce the consequences or some certain consequences by means of the act done, and sometimes employed to signify *bad intent* or *bad motive*. When employed in the sense of *will* or *intentionally*, it is sometimes divided into express, tacit, presumed, and fictitious.[2]

§ 87. As respects the term *malice*, it is sometimes employed to signify the absence of legal excuse,[3] sometimes

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apprehend that there is no ground for distinguishing between the legal and the popular sense of the word, and that it means in its legal sense exactly what it means in its popular sense, namely, a mischievous design or intent to do an injury to an individual, or to the public." (Daly, F. J., Viele *v.* Gray, 10 Abb. Pr. R. 5; 18 How. Pr. R. 550.) The law presumes from the act an intent to bring about its consequences; "to denominate this intent malice or malice in law, when it may have arisen from a good motive, the defendant believing what he alleges to be true, is to employ the word malice in a sense neither justified by its etymology, its ordinary meaning, nor its previous legal signification." (*Id.*) The difference in the import of the word malice in legal and in common acceptation is commented on, 17 Howell's State Trials, 43, 63. And see Sir Thomas Moore's distinction between *Malitia* and *Malevolentia* (1 *id.* 391), and remarks on the introduction of the words *Falso et malitiose* into indictments for libel. (1 *Id.* 30; 6 *id.* 1113.)

The term "malice," it is said, was formerly used in the sense of "cunning," as in the following sentence: "It (the letter) seemed very sensible, and composed with great *malice*, and in no sort to be suspected of being the letter of a madman." (Calendar of State Papers, Domestic Series of the Reign of Charles the First. London Athenæum, 7 Aug., 1869, p. 169.)

[1] "If we would know the nature of wrongs, we must try to determine the meaning of *intention* and negligence with precision, for both of them run in a continued vein through the doctrine of wrongs, and one of them, *intention*, meets us at every step in every department of jurisprudence. (2 Austin's Lect. Juris. 80.) Unless the import of those terms are determined at the outset, the subsequent speculations will be a tissue of uncertain talk. (3 *Id.* 353.)

[2] See Lindley's Studies of Jurisprudence, 168, § 187, and *id.* App. civ.

[3] Malice, the doing any act without a just cause. (1 Chit. Gen'l Pr. 46.) Malice in its legal sense always excludes a just cause. (Jones *v.* Givin, Gilb. Cas. 185.) It

as meaning a bad or wicked motive or intent,[1] sometimes as meaning *scienter*[2] or knowingly, sometimes as meaning intentionally or voluntarily,[3] and often without any definite or ascertainable meaning whatever.[4] The term malice is

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is a technical expression, and means the absence of any excuse. (Penn. *v.* Lewis, Addison's R. 282.) It is implied in every [wrongful] act for which there is no legal justification, excuse, or extenuation. (Penn. *v.* Honeyman, Addison's R. 149.) A term of law denoting directly wickedness, and excluding just cause or excuse. (1 Russ. Cr. 483.) A wrongful act, done intentionally, without just cause or excuse. (Bromage *v.* Prosser, 4 B. & C. 247.) If malice be used as a descriptive term, it must be understood of malice in a technical and artificial sense as merely signifying the absence of any legal justification or excuse. (1 Starkie on Libel, 3.) If malice be used as descriptive * * * it must be understood in its legal and technical sense as merely denoting that which is inferred from the doing of a wrongful act without lawful justification or excuse. (*Id.* 213.) Malice, the doing any act injurious to another without just cause. (Bouvier's Law Dict., tit. Malice; see York's case, 9 Metc 93; Darry *v.* The People, 10 N. Y. 139; Hilliard on Torts, ch. vii, § 106; Mitchell *v.* Jenkins, 5 B. & A. 590.) Malice is the deliberate disregard of the rights of others. (Abbott, Ch. J., 3 B. & C. 584.)

[1] "*Malice.* In criminal law and general practice, wickedness of purpose; a spiteful or malevolent design against another; a settled purpose to injure or destroy another. Any formed design of doing mischief. (1 Hale's P. C. 455, Am. ed. note; 2 Stra. 766.) Any evil design in general. (4 Bl. Com. 198.) A disposition or inclination to do a bad thing. (2 Rolle's R. 461.) General wickedness of heart; inhuman or reckless disregard of the lives or safety of others, as when one cooly discharges a gun, or throws any dangerous missile among a multitude of people, or strikes even upon provocation with a weapon that must produce death. (4 Bl. Com. 199, 200.) Deliberate disregard of the rights of others, as when one carries on the trade of melting tallow to the annoyance of the neighboring dwellings. (Abbott, C. J., 3 B. & C. 584; Burrill's Law Dict., tit. Malice, and see p. 121, note 2, *ante*.)

[2] "Maliciously is sometimes equivalent to *scienter*." (3 Austin's Lect. Juris. 327.) A "*conscious violation*" of law. (9 Cl. & Fin. 321; and Sherwin *v.* Swindall, 12 M. & W. 787.) In the Code prepared by Messrs. Austin & Lewis for the Island of Malta, they employ the phrase "*culpable knowledge*" in lieu of "*implied malice.*" See Appendix A. to House of Lords' Report on Law of Defamation, A. D. 1843.

[3] If I am arraigned of felony, and willfully stand mute, I am said to do it of *malice*, because it is a wrongful act and done *intentionally*. (Bayley, J., Bromage *v.* Prosser, 4 B. & C. 247.) Any unlawful act done willfully is malicious. (Commonwealth *v.* Snelling, 15 Pick. 337.) In this respect, malice resembles a promise. A promise may be express or implied, but the only difference between an express and implied promise is the mode of proof. (N. R'road *v.* Miller, 10 Barb. 260.) In an action of libel, malice consists in intentionally, doing what is injurious to another, falsely or without justifiable cause, and the presumption is against the truth or justifiable cause of the publication, until the contrary is expressly proved by evidence from the defendant. (Hagan *v.* Hendry, 18 Md. 177.)

[4] In the English law, in certain cases we have employed the word *malice* to mean intention generally. As malice implies intention, it has been extended to cases in

also divided into *malice in fact*,[1] and *express malice* and *implied malice*.[2] Probably the phrase implied malice is identical with the phrase malice in law, and the phrase express malice with the phrase malice in fact; for among the definitions we find malice in law defined as "The

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which there is no malice. As I shall show, it does not denote the motive. And it is manifest that the motive to a criminal action may be laudable. The intention of an act, suggested by a blamable motive, lawful. (2 Austin's Lect. Juris. 110.) It having been assumed inconsiderately that malice or criminal design is of the essence of *every* crime, the term is extended abusively to negligence * * * it is often confounded with malice, as denoting malevolence, insomuch that malevolence (though the motive or inducement of the party is foreign to his guilt or innocence) *is supposed to be* essential to the crime. (3 *Id.* 327.) Malice has also been defined "as the plain indication of a heart regardless of social duty, and fatally bent on mischief" (U. S. *v.* Cornell, 2 Mason, 60); improper motives (Weekerly *v.* Geyer, 1 S. & R. 35); willfulness (Dexter *v.* Spear, 4 Mason, 115; Holt on Libel, 55); a design formed of doing mischief to another (Reg. *v.* Mawgridge, Kely. R. 127); any wicked or mischievous intention of the mind (Rex. *v.* Harvey, 2 B. & C. 257). *Malice*, as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. (11 S. & R. 39, 40.) Indeed, *in some cases it seems not to require any intention in order to make an act malicious.* When slander has been published, therefore, the proper question for the jury is not whether the *intention* of the publication was to injure the plaintiff, but whether the tendency of the matter published was so injurious. (10 B. & C. 472; s. c. 21 E. C. L. Rep. 117; and see 3 B. & C. 584; s. c. 10 E. C. L. Rep. 179. Bouvier's Law Dict. *voce* Malice.)

[1] Malice "has been sometimes divided into legal malice or malice in law, and actual malice or malice in fact. These terms might seem to imply that the two kinds of malice are different in their nature. The true distinction, however, is not in the malice itself, but simply in the evidence by which it is established. In all ordinary cases, if the charge complained of is injurious, and no justifiable motive for making it is apparent, malice is inferred from the falsity of the charge. The law in such cases does not impute malice not existing in fact, but presumes a malicious motive for making a charge which is both false and injurious when no other motive appears. When, however, the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence. It is actual malice in either case, the proof only is different." (Selden, J., Lewis *v.* Chapman, 16 N. Y. 372.) The jury may infer malice from want of probable cause, but they are not bound to make this inference. And if malice is deduced from want of probable cause, it is as much malice in fact, within the meaning of the law, as though shown or deduced from any other fact or facts. (Smith *v.* Howard, Supreme Court, Iowa.)

[2] The distinction between express and implied malice is well illustrated in the argument of that distinguished lawyer, Nicholas Hill, in Darry *v.* The People, 10 N. Y. 123, as thus: The term, *express* malice, originally meant malice proved independ-

malice which is inferred from the doing a wrongful act without lawful justification or excuse."[1] The distinction between malice in law and malice in fact is supposed to consist in this, that the one is *inferred* and the other is *proved.* The attempted distinction is unreal and unsound; there is no distinction between what is inferred and what is proved—*what is supposed to be rightly inferred is proved.* "We say of fact, it is proved when we believe its truth by reason of some other fact from which it is said to follow."[2] Some judges have avoided this objection by denying that *malice in law* is a question of fact, and styling it *a conclusion of law* not required to be proved, and not permitted to be denied.[3] If malice in law is a con-

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ently of the mere act from which death resulted, and *implied* malice the reverse. They therefore described only different modes of proving actual guilt, not different degrees of it; and they belonged to the law of evidence, not to a definition of homicide. They did not even indicate different degrees of evidence, both kinds when sufficient being conclusive until overcome. And they were applicable to every case where proof of the actual intent was requisite to characterize an offence." He supports these views by a profuse citation of authorities. The opinions in this case should be perused by those who desire information on the subject of implied malice.

[1] 1 Starkie on Libel, 213.

[2] Mill's Logic, b. 2, c. 1, § 1.

[3] "The malicious intent of the publication is not a question of fact, but a conclusion of law. It is the intent which the law implies, and which the plaintiff is, therefore, not required to prove, nor the defendant permitted to deny." (Duer, J., Fry *v.* Bennett, 1 Code Rep. N. S. 243; 5 Sandf. 54.) The only case in which malice may be proved is where privilege is pleaded. (Root *v.* Lowndes, 6 Hill, 520; Washburn *v.* Cook, 3 Denio, 112; Howard *v.* Sexton, 4 N. Y. 157.) "Malice, so far as the law requires it to sustain the action, is implied from the publication of that which is untrue —the law presuming it to exist in such a case. Therefore, *express malice is not required to sustain the action.*" (Littlejohn *v.* Greeley, 13 Abb. Pr. R. 55.) "It is said that malice is involved in the issue. * * * The answer to this suggestion is, that in the action of slander, except in cases of privileged communications, *express malice* forms no part of the issue. *Legal malice* only is affirmed or denied, and this results from proof of the transaction * * * which the law pronounces wrongful, and therefore malicious.—2 Greenl. Ev. §§ 410, 518, 421." (Gardiner, J. Howard *v.* Sexton, 4 N. Y. 160.) "In an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for the defendant on the ground of a want of malice." (Mansfield, Ch. J., Hargrave *v.* De Breton, 4 Burr. 2425, repeated by Bayley, J., in Bromage *v.* Prosser, 4 B. & C. 247; 6 Dowl. & R. 295.)

clusion of law, then is malice in fact a conclusion of law; and if this be so, it is still true that they are not distinguishable the one from the other. Whether malice *in fact* is here employed in the sense of want of legal excuse or in the sense of bad intent is immaterial on this point. The non-existence of legal excuse in the one case, and the existence of bad intent in the other can be proved only by inference. No argument can make it more clear than the mere statement that the non-existence of a legal excuse does not admit of direct proof, and can be proved only by inference. As to the proof of malice in fact or of a bad intent, we have already considered how *intent* may be proved (§ 83); and from the nature of the subject it will conclusively appear that, inasmuch as, at the time when this division of malice took place parties to a transaction were not allowed to testify, there could at that time be none other than indirect evidence of bad intent or malice. At that time the existence of bad intent or malice could be proved in no other manner than by inferring it from the acts or declarations of the actor, or by the like means as the proof of, so called, malice in law.

§ 88. Pursuing the subject, and upon reference to the text-books and reports to ascertain whether intent and malice are elements of a wrong, we find some authors and judges laying down the rule that *intent*, meaning *bad intent*, is the essential ingredient of every wrong,[1] and this is

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Others say malice must be proved. "The jury have no more right to find malice in the defendant, without sufficient evidence, than they have to find any other fact in the plaintiff's favor without proof." (Woodruff, J., Liddle *v.* Hodges, 2 Bosw. 544.) And see Dolloway *v.* Turrell, 26 Wend. 396; Cooke on Defamation, ch. iv.

[1] Every wrong supposes intention or negligence on the part of the wrong-doer. (2 Austin's Lect. Juris. 2.) Intention, negligence, heedlessness, or rashness, is of the essence of a wrong, is a necessary condition precedent to the existence of guilt (*Id.* 144.) Guilt imports that the party has broken a duty (*Id.* 147, 149); it denotes the intention, and connotes the act, forbearance, or omission, which was the *effect* of his intention (*Id.* 147); and at p. 165: Unlawful intention or unlawful inadvertence is of the essence of injury. And on examining the grounds of exemption from liability, we find the party is, or is presumed to be, clear of intention or inadvertence; and

so universally conceded that all collections of legal maxims include this: "*Actus non facit reum, nisi mens sit rea;*" which is tranlated: "An act does not make guilty, unless the mind be guilty"—that is, unless the intention be criminal; others assert that intent is immaterial in civil actions, *except* in the civil actions for slander and libel;[1] others that intent is immaterial in slander and

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(p. 168) the ultimate ground of exemption for ignorance or error of fact is, the absence of unlawful intention or unlawful inadvertence. At p. 179: An infant or a person insane is exempted from liability, not because he is an infant or insane, but because it is inferred from his infancy or insanity that the wrong was not the consequence of unlawful intention or inadvertence; and (p. 185) the reason assigned by Blackstone and other writers is hardly worth powder and shot. He tells us that a wrong is the effect of a wicked will. And (says) infants and madmen are exempted, because the act goes not with their will, or is not imputable to a wicked will. * * * He cannot mean to affirm that an infant or madman has not as much *will* as the adult or the sane. [It must be observed that Austin makes a distinction between will and motive. By will, if we interpret him aright, he intends only the mere act of volition.]

Intent is the essence of crime. (Krom *v.* Schoonmaker, 3 Barb. 647.) The criminality of the act depends altogether upon the intent with which it was done. (Genet *v.* Mitchell, 7 Johns. 120; and see 2 Starkie on Ev., tit. Intention; 5 Amer. Q'rly Rev. 79.)

[1] See Burrill's Law Dict., tit. *Actus*, where he adds: The intent and the act must both concur to constitute the crime. (Kenyon, Ch. J., 7 T. R. 514; Broom's Max. 144.) This maxim is exclusively applicable to criminal law, *and to civil proceedings* for slander and libel; in [qy. other] civil actions, the intent is immaterial if the act done be injurious to another. (*Id.* 155, 161.) The maxim, "*Affectio tua nomen imponit operi tuo*," [your disposition or intention gives name or character to your work or act] embodies the same principle. (Bract. fo. 101 b.) See Broom's Maxims, tit. *Actus non facit*, &c., where he says: With respect to libel and slander the rule is * * * where an occasion exits which, if fairly acted upon, furnishes a legal protection to the party who makes the communication complained of, the *actual* intention of the party affords a boundary of legal liability. See also Burrill's Law Dict. tit. *Voluntas*, citing *Voluntas et propositum distinguunt maleficia*—Will and purpose characterize crimes. *Crimen non contrahitur, nisi voluntas nocendi intercedat*—Crime is not contracted unless the intention of doing harm be present. *Tolle voluntatem et cris omnis actus indifferens.* Take away *will* and every act becomes indifferent.

We cannot pass the quotation of a so-called law maxim without entering our protest against their reception as legal *axioms.* We believe that not a single law maxim can be pointed out which is not obnoxious to objection. The old law maxims must be put aside or forgotten, or remembered only as things of the past and dead, even as we have put aside and forgotten maxims in science, supplying their places with maxims drawn from a larger experience and more philosophical analysis. "Perhaps there is a period in every system of law previous to which the formation of maxims will be productive of bad effects, as leading to the establishment of principles which it is not

libel, or immaterial except under certain circumstances;[1] and others, that the essential element of a slander or a libel is malice or a malicious intent, the mind must be in

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permitted to controvert, but which more enlightened views would repudiate." (Fortesque de Laudibus, &c., ch. viii, note to edition by Amos. See Dodderidge's English Lawyer; Doctor and Student, Dialogue I, ch. viii, ix; Bacon's Preface to his Maxims.) The benefit which science has received from the use of maxims is of a questionable nature, and the adoption of these is of a questionable nature whenever the ideas are confused. (Locke on the Understanding, B'k IV, ch. vii.) In Bonomi *v.* Backhouse (27 Law Jour. N. S. 388, Q. B.), Erle, J., says: "The maxim, *sic utere tuo ut alienum non lædas*, is mere verbiage. A party may damage the property of another where the law permits, and he may not where the law prohibits; so that the maxim can never be applied until the law is ascertained, and when it is, the maxim is superfluous." And in Jenkins *v.* Wheeler (4 Robertson, 575), the court held that the maxim, Freight is the mother of wages, is not universally true.

[1] The secret intention of the publisher is immaterial (Hankinson *v.* Bilby, 16 M. & W. 442.) "It is an error to suppose that *motive*, except where the words are privileged, is in any way essential to a cause of action." The motive of the defendant is wholly immaterial as respects the right of action. The motive may be a good or a bad one. (Daly, F. J., Viele *v.* Gray, 10 Abb. Pr. R. 6, 7; 18 How. Pr. R. 550.) In an action brought by A against B for slandering the title of the former to certain slaves by him exposed to public sale, a verdict was found for him; B brought his bill praying for relief, and an injunction against the verdict, and it was held that as the loss in the sale of the slaves was caused by B, *even though he was believed to have designed no injury*, he was bound to make reparation, and his bill was dismissed. (Ross *v.* Pines, Wythe, 71.) There is no instance of a verdict for the defendant on the ground of want of malice. (Mansfield, Ch. J., Hargrave *v.* Le Breton, 4 Burr. 2425; repeated by Bailey, J., Bromage *v.* Prosser, 4 B. & C. 247.) If I give a man slanderous words, whereby I damnify him in his name and credit, *it is not material whether I use them upon sudden choler* and provocation, *or of set malice*, but *in an action upon the case I shall render damages alike.* (Bacon's Maxims of the Law, Regula VII.)

The *intent* with which an act is done is by no means the test of the liability of a party to an action of trespass. (Guille *v.* Swan, 19 Johns. 381; Percival *v.* Hickey, 18 *id.* 257; Tremain *v.* Cohoes Co., 2 N. Y. 164; Ruckman *v.* Cowell, 1 N. Y. 507; Safford *v.* Wyckoff, 1 Hill, 11.) *Bona fides* will not protect a magistrate who does an illegal act. (Prickett *v.* Greatrex, 1 New Mag. Cas. 543; 7 Law Times, 139.) It is immaterial with what motive a man does a legal act. (Humphrey *v.* Douglass, 11 Verm. R. 22); and so of an unlawful act. (Amick *v.* O'Hara, 6 Blackf. 258.) Intention held to be immaterial. (Bullock *v.* Babcock, 3 Wend. 391; Baker *v.* Bailey, 16 Barb. 60.) Intent immaterial if the words are a libel. (People *v.* Freer, 1 Caines' Rep. 485.) In a private action for libel the motives are out of the question. (Root *v.* King, 7 Cow. 633.) If the words are not actionable *per se*, and have not occasioned any special damage, no amount of malice in the publisher will make them actionable. (Kelly *v.* Partington, 3 Nev. & M. 116; 5 B. & Adol. 645; and see 2 Nev. & M. 460; 4 B. & Adol. 700.) "Bad motives in doing an act which violates no legal right of another, cannot make that act a ground of action." (Pickard *v.* Collins, 23 Barb. 459.) If the fact be justified, the motive, intention, and manner are immaterial. (Burr. 807.)

fault;[1] and some expressly, and some by implication, assert that this fault in the mind, this bad intent or

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Where an act in itself indifferent if done with a particular intent becomes criminal, there the intent must be proved and found; but when the act is in itself unlawful (i. e. *prima facie* and unexplained), the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent; in the latter case the intention is immaterial, and therefore not a question of fact in issue, for the crime consists in publishing a libel: "*a criminal intention in the writer is no part of the definition of the crime of libel at the common law.*" *Per* Lord Mansfield, in Woodfall's case, the words quoted are from the opinion of the twelve English judges delivered in the House of Lords upon questions put to them on the subject of libel. (Journals of the House of Lords, 1792, Appendix 27; and 22 Howell's State Trials, 300; The People *v.* Crosswell, 3 Johns. Cas. 364.) Except in the cases of privileged communications, express malice forms no part of the issue. (Howard *v.* Sexton, 4 N. Y. 157, and see p. 125, note 3, *ante*.) "In which case [privileged communication] express malice must be shown, while in other cases express malice forms no part of the issue. Thorn *v.* Moser, 1 Denio, 488; The State *v.* Burnham, 9 N. Hamp. 34; Howard *v.* Sexton, 4 N. Y. 157." (W. F. Allen, J., Bush *v.* Prosser, 11 N. Y. 355; see *id.* p. 358, and the next following note.)

[1] "To constitute that injury [slander] malice must be proved, not mere general ill-will, but malice, in the special case set forth in the pleadings, to be inferred from it and the attending circumstances." (Gardiner, J., Howard *v.* Sexton, 4 N. Y. 161; quoted and approved by Rosekrans, J., Fry *v.* Bennett, 28 N. Y. 328; and by W. F. Allen, J., Bush *v.* Prosser, 11 N. Y. 357.) "Malice is essential to every action for libel." (Selden, J., Lewis *v.* Chapman, 16 N. Y. 372.) "In *all* cases malice is essential to the action. Not *imputed* malice merely, but actual malice, malice established by proof." (Selden, J., Bush *v.* Prosser, 11 N. Y. 358.) To maintain the action there must be: "(1) malice in the defendant; (2) injury to the plaintiff; (3) that the words should be untrue." (Ellenborough, Ch. J., Maitland *v.* Goldney, 2 East, 426.) The malice of the publication, or the intent to defame the reputation of another, is the essence of the offence of libel. (Com'wealth *v.* Clapp, 4 Mass. R. 163; Com'wealth *v.* Snelling, 15 Pick. 337.) In order to render the publisher amenable to the law, the publication must be *maliciously* made, but malice will be presumed if the matter be libelous. (Bouvier's Law Dict. *voce* Publisher.) "The *criminality* of the charge in the indictment consisted in a *malicious* and seditious *intention*. There can be no crime without a wicked mind." (Kent, J., The People *v.* Crosswell, 3 Johns. Cas. 364); and "as a libel is a *defamatory* publication made with a *malicious intent*. (*Id.* 377.) The injury consists in "*falsely and maliciously*" charging another with, &c. (Kent's Com., Part IV, sect. 24, p. 706, of vol. I, 11th ed., and *id.* p. 617.) "The essential ground of action for defamation consists of the *malicious intention*, and when the mind is not in fault, no prosecution can be maintained;" and the story recited from Fox's Martyrology, in Brook *v.* Montague, Cro. Jac. 91, is referred to. "The mind must be in fault and show a malicious intention to defame." (Kenyon, J., Rex *v.* Abingdon, 1 Esp. 226.) "By the law of England, *malice* is an essential ingredient in every action on the case for slander." (Borthwick on Libel, 194.) And in a note (*id.*) attributed to Starkie, it is said: Every definition of the subject-matter of an action for slander, to be found in the books of reports or elementary writers, includes malice as an essential ingredient. Malice is the gist of the action for slander. (McKee *v.* Ingalls, 4 Scam.

malice, must be, in fact or impliedly, in the mind of the defendant in the action. And the divisions of will and of malice heretofore referred to (§§ 86, 87) appear to have been designed to meet this requirement in those cases in which there is no pretence of any bad intent, or

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30; White *v.* Nicholls, 3 How. U. S. Rep. 266.) There must be a mischievous intention. (George on Libel, 162.) The guilt [gist] of and essential ground of action for defamation consists in the *malicious* intention, and when the mind is not in fault, no prosecution can be maintained. (2 Kent's Com. 26; W. F. Allen, J., Bush *v.* Prosser, 11 N. Y. 355.) In the trial of the Seven Bishops, Justices Holloway and Powell both say, to make a libel it must be malicious. "The *main* question is, *quo animo* the defendant published the article complained of. * * * The plaintiff is bound to show that the defendant was actuated by malice." (Ellenborough, Chief J., Tabart *v.* Tipper, 1 Camp. 350, 351.) "The gist of an action of slander, for words in themselves actionable, is the *malice* which produced them; take away this, and the suit is not maintainable in any shape." (Rossell, J., Cook *v.* Barkley, 1 Penn. N. J. Rep. 180, and p. 183 *per* Pennington, J.) "The *quo animo* with which the words were spoken was the point in issue, as malice constitutes the gist of the action." "It is said there need be no express malice except in the case of privileged communications, that, in other words, implied or legal malice is all that is required. What is meant by *implied* malice? Does it mean malice which the law imputes without any proof of its existence? I apprehend not. It means this: that the fact that the defendant is shown to have published a false charge against another which was calculated to injure him, *proves* that the defendant was actuated by malicious motives, unless the circumstances are such as to suggest some other and innocent motive. This is nothing more than the application of a familiar rule of evidence, viz, that every person is presumed to intend that which is the natural consequence of his actions. * * * But is malice any more the ground of the action in cases of privileged communication than in others? Clearly not. It is called, for the sake of convenience express malice, in the one case, and implied, in the other; but the malice is the same, the difference is in the proof alone. We may, therefore, assume that in *all cases* malice is essential to the action. Not *imputed* malice merely, but actual malice; malice established by proof." (Selden, J., Bush *v.* Prosser, 11 N. Y. 358.) In actions for slander, it is of the essence of the action that the words be spoken maliciously. (Jarvis *v.* Hatheway, 3 Johns. 180.) No doubt but malice, as well as falsehood, is essential to sustain an action of slander. (Thorn *v.* Blanchard, 5 Johns. 529.)

The case of Mercer *v.* Sparks (Owen, 51; Noy, 35) was cited in McPherson *v.* Daniels (10 B. & Cr. 266) as an authority for the proposition that, in an action for slander, malice need not be alleged; but *per* Parke, J., "that was after verdict, and malice must have been proved at the trial." Malice "may be said to be a necessary ingredient, in one form or other, of all crimes whatever." (Stephen's Crim. Law, 81.) As to necessity of proving malice in actions for slander and libel, see George on Libel, 149; Jones on Libel, 8, 9, 11, 14, Comyn's Dig. Action for Defamation, G; Smith *v.* Ashley, 11 Met. 486; McCorkle *v.* Binns, 5 Binney, 340; Coxhead *v.* Richards, 2 C. B. 608; Lillie *v.* Price, 5 Ad. & El. 645; Harwood *v.* Astley, 4 Bos. & Pul. 47; and Hastings *v.* Lusk, 22 Wend. 416; Steele *v.* Southwick, 9 Johns. 214; Root *v.* King, 4 Wend. 113; 1 Saund. 243, *note* 4.)

no possibility of any bad intent in the mind of the defendant in the action. There will be no necessity for any such division of will or malice, if the distinction between the wrong and the liability be observed (§ 66). At the same time that courts hold malice, meaning bad intent, to be a necessary ingredient of slander and libel, they hold that it is not absolutely necessary to allege malice in a declaration,[1] and that the introduction of an allegation of malice in a declaration for libel is "rather to exclude the supposition that the publication had been made on some innocent occasion, than for any other purpose."[2] And except to aggravate the damages, courts will not allow, on a trial, any evidence of malice (bad intent) in addition to that which is said to be inferred, until evidence has been given which countervails or reverses the so-called presumption of malice, or malice in law;[3] nor will they allow this presumption, nor malice in fact, to be contradicted by any mere denial, or shown not to exist by proving an actual good intent. They permit but one way of evading this malice in law, and that is by showing the existence of a legal excuse for the act of publication. If the legal excuse shown be a *prima facie* one only, its effect is merely to remove the alleged presumption of malice, and raise an alleged presumption of absence of malice, and, as it is said, require the plaintiff to show malice in fact. This very intricate course of procedure arises from erroneously treating, in practice, as an *affirm-*

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[1] In a complaint for libel, it is not necessary to aver express malice. (Purdy *v.* Carpenter, 6 How. Pr. R. 366.) Maliciously need not be used, if words of an equivalent import are used. (White *v.* Nicholls, 3 How. U. S. Rep. 266; Opdyke *v.* Weed, 8 Abb. Pr. R. 223; Viele *v.* Gray, 10 *id.* 6.) The omission is cured by verdict. (McPherson *v.* Daniels, 10 B. & C. 266; Taylor *v.* Kneeland, 1 Doug. 67.) Wrongfully and injuriously are not equivalent to maliciously. (De Medina *v.* Grove, 10 Jur. 426.)

[2] Abbott, Ch. J., Duncan *v.* Thwaites, 3 B. & C. 585.

[3] In the adjustment of damages, malice [*bad intent*] may become an element. (Viele *v.* Gray, 10 Abb. Pr. R. 6; 18 How. Pr. R. 566; Root *v.* King, 7 Cow. 633; Fry *v.* Bennett, 28 N. Y. 327; s. c. 3 Bosw. 200; Taylor *v.* Church, 1 E. D. Smith, 279; and 8 N. Y. 452; Littlejohn *v.* Greeley, 13 Abb. Pr. R. 57; Bush *v.* Prosser, 11 N. Y. 359; and see *post*, Damages.)

ative part of the essential element of a wrong that which is more properly a *negative* part, not required to establish the fact of a wrong done, but required only when it is designed to show that what is a wrongful act, and *prima facie* a wrong, is not so in fact (§ 63). Let a wrongful act stand for a wrong, unless and until a legal excuse be shown, and we make intelligible and consistent what is now difficult to understand, and only to be reconciled by a series of fictions.[1]

§ 89. One meaning in which intent or intention is employed is will. When so employed it corresponds to what we have described as voluntary. And if instead of saying *intent* is necessary to constitute a wrong, we say *will* is necessary to constitute a wrong, and then keep in view the distinction between will (voluntary) and intent, we at once remove very much of the difficulty which has been supposed to be inherent in the law relating to slander and libel. It is conceded, at least by some, that in civil actions other than those for slander and libel, intent, in the sense of intending the consequences of an act, is immaterial; why should the civil actions for slander and libel be exceptions? Certainly the burden of proving them to be exceptions lies upon those who insist that they are not within the rules which govern every other civil action.

§ 90. One meaning of malice is absence of legal excuse. This is the sense in which the term is most frequently employed, and it is, we conceive, the only sense in which it is properly employed.[2] Substitute "absence of legal

[1] Mr. Stephen, after referring to the manner in which the word "malicious" operates in shifting the burden of proof from the prosecutor to the prisoner, and stating that legal fictions are matters of regret, says: "It would be better to throw the law into a different shape, and to enact specifically that persons who do acts of which the natural consequence is to kill, &c., shall be punished, instead of introducing the question of intent at all. (Stephen's Crim. Law, 304.)

[2] See p. 122, note 3, *ante*

excuse" for "malice" in many opinions in the reports which are difficult to be understood, and they will become easily intelligible, and accord with the principles we venture to propound.

To illustrate, that what is called malice in fact really means nothing more nor less than absence of legal excuse; suppose A. has untruly said B. is a thief, under circumstances that A. believing B. to be a thief, would constitute a legal excuse. A familiar instance of this is the case of giving, as it is termed, the character of a former employè. In the case supposed, the material inquiry is: what was A's belief? To answer this inquiry, and only for the purpose of answering this inquiry, it may be material to ascertain what feeling or intention A. had towards B.; if the feeling or intention is found to be friendly, it is a link in the chain of evidence that A. spoke believing what he said. If the feeling or intention of A. towards B. was unfriendly, it is a link in the chain of evidence that A. spoke rather from that feeling or intent or for some purpose other than from his belief; and being spoken not in a belief of its truth, the speaking was out of the pale of legal excuse, and was wrongful, not merely or in anywise because of the intent, which may have been good or bad, but because the speaking was not under circumstances which constitute a legal excuse; namely, under a belief that the words spoken were true. If in such a case A. was allowed to testify, and was to admit that he did not believe to be true what he said concerning B., but that he spoke without any intent to injure or with a good intent towards B. or any other, that testimony would not constitute any defence; admitting that he did not believe what he spoke would take away the legal excuse.

§ 91. The intent—meaning the intent to effect certain consequences—with which an act is done is material on the question of the amount of damages: the absence of a bad intent will mitigate the damages; the presence of a

bad intent will aggravate them. The intent of the actor is sometimes material as a link in the chain of evidence to determine whether or not some certain act was or was not done under circumstances constituting a legal excuse, as where the legal excuse is dependent upon the question: what was the belief of the actor? With these exceptions, we conceive that intent is never material and that intent is never an essential element of a wrong. No amount of good intent will excuse an act otherwise wrongful, and no amount of bad intent will make wrongful that which is otherwise a permitted act. If intent is not an essential element of a wrong, neither, in the sense of bad intent, is malice. If the term malice is to be retained in use as a technical term, it must be only in the sense of want of legal excuse.

§ 92. This view is not, we are pleased to say, any innovation or novel doctrine; it is but a return to the old paths, from which the departure has been very wide. Holt, after referring to the objections urged against the law of libel, says[1]: "It is urged that the motive of many publications which the law decrees libels, may be innocent and even laudable; and that without the proof of malice, or, what is equivalent to malice, the mere act of composing or publishing a libel ought not to be the subject of punishment. This objection only becomes specious from the misapprehension of the term *malice*. Malice, in legal understanding, implies no more than willfulness.[2] The first inquiry of a civil judicature, if the fact do not speak for itself as a *malum in se*, is to find out whether it be willfully committed; *it searches not into the intention or motive any further or otherwise than as they are the marks of a voluntary act;* and having found it so, it concerns itself

[1] Holt on Libel, conclusion of ch. iii., b'k 1, p. 55; and see comments on this, 2 Mence on Libel, 25.

[2] See Dexter *v.* Spear, 4 Mason, 115.

no more with a man's design or principle of acting, but punishes without scruple what manifestly to the offender himself was a breach of the command of the legislature. The law collects the intention from the act itself—the act being in itself unlawful [wrongful], an evil intent is inferred, and needs no proof by extrinsic evidence. That mischief which a man does he is supposed to mean, and he is not permitted to put in issue a meaning abstracted from the fact. 'The crime consists in publishing a libel; a criminal intention in the writer is no part of the definition of the crime of libel at common law.' 'He who scattereth firebrands, arrows, and death (which if not an accurate is a very intelligent description of a libel) is *ea ratione* criminal.' It is not incumbent on the prosecution to prove his intent, and on his part he shall not be heard to say, 'Am I not in sport.' To determine, therefore, the guilt of a civil act, and to inflict punishment on the offender, there is no need of knowing his motives. Human laws require no justification in imposing penalties for an act prohibited by the magistrate, in its consequences injurious, and which has indubitable marks of being voluntarily committed." This exhibits and illustrates our view that the intent which the law regards is that intent which enters into the question: was the act voluntary? and this it determines by the knowledge of the actor, did he know or ought he to have known, that his act would produce an injury, if he had this knowledge, or might, but for his own misfeasance or omission, have had this knowledge, he is liable for his act and its consequences. And it is altogether immaterial whether we say he is liable for the act and its consequences, or say he is liable for the act because it was voluntary, and for the consequences because he must be presumed to have intended them. The latter mode of statement is the more usual, but we think less correct, and may have contributed to the confusion which pervades our subject.

CHAPTER VI.

PUBLICATION—PUBLISHER.

A Publication is Necessary—Meaning of the term Publication—The Language Published must be Understood—The Publication may be Orally or in Writing—What amounts to an Oral and what to a Written Publication—Publication of Effigy—Requisites of an Oral Publication—Requisites of a Written Publication—Time of Publication—Place of Publication—Who is a Publisher—Republication and Repetition—Distinction between—Joint Publication—Liability for Publications—Voluntary and Involuntary Publications—Liability of Principal and Agent—Newspaper Publisher—Bookseller.

§ 93. As heretofore observed[1] (§ 23), for language to affect another than its author the language must be pub-

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[1] To publish, means not only a "giving out," but a "taking in." In English we have only one word to express the idea, in the German they have two words. They say of a book *herausgegeben* that it is "given out," but not that it is published until sales of it have been effected.

"Publication [of a writing] is nothing more than doing the last act for the accomplishment of the mischief intended by it." (Rex *v.* Burdett, 4 B. & Ald. 126.)

"The sense in which the word published is used in law, is an uttering of the libel. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet the meaning is not so limited in law. The making it known to an individual only is indisputably, in law, a publishing. (*Id.*)

The mode of publication of writings in early times was by scattering them in the highways or fields—(see Darcy *v.* Markham, Hobart, 120.) The conclusion of "The Outlaw's Song of Trail-le-baston," temp. Edward II, is as follows:

Escrit estoit en parchemyn pur mout remember
E gitté en haut chemyn qe um le dust trover.

[It was written on parchment to be better remembered, and cast on the highway that people may find it.] See Political Songs of England from John to Edward II. Edited and translated by Thomas Wright, Camden Society, 1839. (Astor Library.) And see London Quarterly Review, April, 1857.

This method of publication seems to have continued at least until the sixteenth

lished; that is to say, it must be communicated to some other than its author. There must be a publication.[1]

§ 94. Publication is an ambiguous term, employed to signify sometimes the matter published, sometimes an act of publishing only, and sometimes an act of publishing such as may subject the publisher to legal liability. Ordinarily the context will disclose in which of these several senses the term is employed.

§ 95. Every communication of language by one to another is a publication. But to constitute an *actionable publication* that is, such a publication as may confer a

century. John Fox mentions "A libel or book entitled the Supplication of Beggars, thrown and scattered at the procession in Westminster, on Candlemas day (2d February, 1526), before King Henry the Eighth, for him to read and peruse;" and again, Wolsey immediately went to his Majesty (Henry Eighth) complaining of divers seditious persons having scattered abroad books. The like mode of publication was adopted by Burdet, tried "for conspiring to kill the king and the prince by casting their nativities, fortelling the speedy death of both, and *scattering* letters containing the prophecy among the people." 9 Foss's Judges of England, and Croke Car. 121.

The meaning and etymology of the word *Trail-bebaston* is discussed in 3 Foss's Judges of England, 30, and note to Political Songs of England, and claimed to be different from that given in the Law Dictionaries.

That the mode of publication of libels among the Romans was by scattering them on the highways may be inferred from the provisions in the Codes in reference to the finding and finders of libels. The 4th resolution in Halliwood's Case, in Coke's fifth report, commences, "If any one *find* a libel." (See 2 Starkie on Libel, 226.)

A new method of framing and dispersing libels was invented, says Hume, by the leaders of popular discontent: petitions to Parliament were drawn up stating particular grievances, presented and immediately printed. And Lord Campbell (VI Lives of the Chancellors, 149) speaks of "a dispersion of libels in Westminster Hall, by means of an explosion of gunpowder, while the judges were sitting there;" of this he gives a further account, same volume, p. 186.

A most cowardly and atrocious, yet ingenious method of defaming is mentioned by Hazlitt in his "Essay on Wills," and referred to in the London Quarterly Review for October, 1860, as thus: "A wealthy nobleman hit upon a still more culpable device for securing posthumous ignominy. He gave one lady of rank a legacy 'by way of compensation for injury he feared he had done her fair fame;' a large sum to the daughter of another, a married woman, 'from a strong conviction that he was the father;' and so on through half a dozen more items of the sort, each leveled at the reputation of some one from whom he had suffered a repulse: the whole being nullified (without being erased) by a codicil."

[1] There must be a publication. (Lyle *v.* Clason, 1 Cai. 581; Weir *v.* Hoss, 6 Ala. 881.)

remedy by civil action, it is essential that there be a publication to a *third person*, that is, to some person other than the author or publisher and he whom or whose affairs the language concerns. No possible form of words can confer a right of action for slander or libel, unless there has been a publication to some third person.[1] The husband or wife of the author or publisher, or the husband or wife of him whom or whose affairs the language concerns, is regarded as a third person.[2]

§ 96. There cannot properly be said to be a communi-

[1] 2 Starkie on Libel, 13, 14, citing 1 W. Saund. 132, note 2; Phillips *v.* Jansen, 2 Esp. Cas. 226; Hick's Case, Hob. 215; Rex *v.* Wegener, 2 Stark. Cas. 245; Force *v.* Warren, 15 C. B. N. S. 806; Edwards *v.* Wooton, 12 Rep. 35. Where the defendant, knowing that letters addressed to the plaintiff were opened and read by his clerk, wrote and sent a letter directed to the plaintiff which was opened and read by his, plaintiff's, clerk, this was held to be a publication. (Delacroix *v.* Thevenot, 2 Starkie's Cas. 63.) Where a letter, folded but not sealed, was delivered to a third person to be conveyed to the plaintiff, and was so conveyed without being read by any one, held there was no publication. (Clutterbuck *v.* Chaffers, 1 Starkie's Rep. 471; Day *v.* Bream, 2 Moo. & Rob. 54.) Where a writing is sent to the plaintiff, and he, in the presence of a third person, repeats the contents of such writing to the writer, who admits having sent such a writing, this is not a publication of the writing to the third party. (Fonville *v.* Nease, Dudley (S. C.), 303.)

The delivery of a writing by the governor of a colony to his attorney-general, not for an official purpose, is an actionable publication. (Wyatt *v.* Gore, Holt, 299.) So is the delivery of a writing to any third person. (Ward *v.* Smith, 6. Bing. 749.) Giving a writing to a witness to copy, the copy being immediately sent to a foreign country, and the original retained in the defendant's possession, is a publication upon which the cause of action arises *here*. (Keene *v.* Ruff, 1 Clarke (Iowa), 482.)

[2] A sealed letter, addressed and delivered to the wife, containing a libel on her husband, is a publication. (Schenck *v.* Schenck, 1 Spencer, 208; Wenman *v.* Ash, 13 Com. B. 836): and see Mills *v.* Monday, Lev. 112.

Gibbons wrote defamatory matter of Trumbull and had fifty copies printed in pamphlet form in Massachusetts. Forty-five copies he retained and five copies he sent to his wife in New Jersey, indorsing four of them with the names of certain persons, acquaintances of the wife, but without any instructions to the wife as to how she should dispose of the copies so sent her. The wife delivered two of the copies in New Jersey to the persons whose names were indorsed thereon, and the others she delivered in New Jersey to Trumbull, who exhibited them to various persons. On Trumbull suing Gibbons in New York for libel, it was contended for defendant (1) that there was no publication by defendant, (2) or no publication within the State. The second point was overruled, and as to the first it was held that *the delivery of the manuscript to be printed* was a publication, although a delivery to a wife in confidence would not be a publication, yet in the case then before the court the wife acted as the agent of her husband, and her delivery of the pamphlets amounted to a publication by the defendant. (Trumbull *v.* Gibbons, 3 City Hall Recorder, 97.)

cation of language by one to another unless that other understands the signification or meaning of the language sought to be communicated.[1] When we say the language must be understood by the one to whom it is published, we mean only that the matter published must be in a language which the person to whom it is published can interpret to some meaning. To one who does not understand the language in which a publication is made, it is as to him nothing more than unmeaning sounds or signs and not language (§ 1).[2]

§ 97. The publication of language may, in reference to the place at which the publication is made, be either in the vernacular or in a foreign language. Where the language published is the vernacular of the place of publication, it requires no proof that those who heard or read it understood it; but it may be shown that those who heard or read such language did not in fact understand its significations. Where the language published is one foreign to the place of publication it will not be assumed that those who heard or read understood it, but it may be shown that such hearers or readers did, in fact, understand what they heard or read.[3] Where the matter published is in a language which he who hears or reads it understands, it will be assumed he understood it in the sense which properly belongs to it. In all cases of doubt, the question whether or not the third person to whom the publication

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[1] Keene *v.* Ruff, 1 Clarke (Iowa), 482.

[2] "Scandalous words, if they be spoken in an unknown tongue which none of the auditors understand, will not bear an action because they do no injury." (Danvers Abr. 146, pl. 1, 2.) "Where slander is published in a foreign language it is necessary to show that the hearers understood the language" (2 Starkie on Slander, 52; Fleetwood *v.* Curley, Hob. 267; Viner's Abr. tit. Actions for Words, A. *b.*; 2 Stark. Ev. 844; Holt on Libel, 245), for the slander and damage consist in the apprehension of the hearers. (Cro. Eliz. 496, pl. 16.)

[3] Amann *v.* Damm, 8 Com. B. N. S. 597. But in Ohio it is held that where words are spoken in German in a German county, it will be presumed they were understood, and no averment that they were understood is necessary. (Bechtell *v.* Shaler, Wright, 107.) And as to Welsh words see what is said 1 W. Saund. 242, n. 1.

was made understood the language employed, is a question of fact. How such third person understood the language, that is to say, the sense in which he understood it, is ordinarily a question of interpretation. In our courts a witness cannot be asked how he understood the language, or what he understood by the language.[1] [§ 384.]

§ 98. The publication of language may be orally or in writing. The distinction between these two modes of publication is material to be observed, as it marks the boundary line between slander and libel. That alone is a libel which "has an existence *per se* off the tongue."[2]

§ 99. Where the language has not been reduced to writing, its communication from one to another must be an oral publication. Where the language has been reduced to writing, its communication from one to another may, according to the circumstances of the communication, amount to either an oral publication or a publication in writing.

§ 100. As respect oral language, speech, we must distinguish between the sound itself and the signification of the sound. As respects language in writing, we must distinguish between the writing, *i. e.*, the paper, or other substance written upon; the writing, *i. e.*, the characters inscribed upon the paper, or other substance written upon; and the signification of those inscribed characters, the subject-matter of the writing.

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[1] Smart *v.* Blanchard, 42 N. H. 137; Wright *v.* Paige, 36 Barb. 438; Gibson *v.* Williams, 4 Wend. 320; Van Vechten *v.* Hopkins, 5 Johns. 211. A witness who has heard a conversation cannot be asked "What did you understand by that," without previously laying a foundation for such a question by showing that something had previously occurred in consequence of which the words would convey a meaning different to their ordinary meaning; having done so, the witness may then be asked "What did you understand," &c. (Daines *v.* Hartley, 3 Ex. 200; 11 Law Times, 271: see 2 Starkie on Libel, 52; Fleetwood *v.* Curley, Hob. 267.) See *post Construction.*

[2] Holt on Libel, 254.

§ 101. The possession of a writing, the material written upon, may be parted with, and the writing itself, the material written upon, may be passed from hand to hand without any communication of either the characters inscribed upon such material written upon, or of the signification of such characters. As, for example, the delivery of a sealed letter to another. Such a parting with the writing does not of itself, and without more, amount to a publication of any kind. Thus where a folded letter was delivered to a third person to deliver to him whom the subject-matter of the letter concerned, and the third person delivered the letter as addressed, without reading its contents, it was held that there was not any publication to such third person.[1] But if the messenger had opened and read the letter entrusted to him to carry, that would be a publication, and it would be no defence to say the sender did not intend that the messenger should read the letter.[2]

§ 102. The characters inscribed upon a paper may be communicated by one to another without any parting with the possession of the writing, the material written upon, itself; as by an exposure of the writing, the material written upon, in such a manner as that the characters inscribed upon it may be seen and read by another.

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[1] Clutterbuck *v.* Chaffers. 1 Starkie's Rep. 471.

Throwing a sealed letter, addressed to the plaintiff or at hird person, into the enclosure of another, who delivers it unopened to the plaintiff himself, is not a publication. (Fonville *v.* Nease, Dudley, S. C. 303.)

Sending to the person whom the writing concerns, a letter sealed up is no publication; and a letter is always to be understood as being sealed up, unless otherwise expressed. (Lyle *v.* Clason, 1 Cai. 581; Phillips *v.* Jansen, 2 Esp. 625.) See 1 W. Saund. 132, *note* 2.

Nor would it amount to a publication, though the plaintiff afterwards repeated the contents of it publicly, and the defendant avowed himself the author of it. (Fonville *v.* Nease, Dudley, S. C. 303.)

[2] Fox *v.* Broderick, 14 Irish Law Rep. 453.

§ 103. The subject-matter of a writing, the signification of the characters inscribed upon a paper, may be communicated orally by one to another; and if this be done without any parting with the possession of the writing itself, and without any exposure of such writing to any other person; as where one reads the contents of a writing to another without parting with the writing itself, and without permitting the other to read the contents of such writing. This we *suppose* would amount only to an oral publication.[1]

§ 104. Parting with the possession of a writing, the material written upon, in such a condition and under such circumstances as that the characters inscribed upon it may be and are seen and read and understood by another, is a publication in writing. It amounts to a publication if or provided the subject-matter be read and understood.[2]

§ 105. An exposure by one person to another of a writing, the material written upon, without parting with

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[1] The writer's reading to a stranger his letter to the plaintiff, before dispatching it, is a publication. (Snyder *v.* Andrews, 6 Barb. 43; McCombs *v.* Tuttle, 5 Blackf. 431; Van Cleef *v.* Lawrence, 2 City Hall Recorder, 41.) Query, the kind of publication.

[2] Posting a writing in a public place, and taking it down before any one had read it, would not be a publication. (2 Starkie on Libel, 16, note *n.*)

A publication by delivery of letters containing the defamatory matter, or by posting the writing on a church door, are termed *constructive publications* in Baldwin *v.* Elphinstone, 2 W. Black. Rep. 1037, referring to Rastell's Entries tit. Action sur le case, 13.

By section 17 of statute 38 Geo. III, ch. lxxviii, the printer or publisher of every newspaper or other such paper is required to deliver a copy of the paper at the stamp office, it was held that such delivery was a publication. (Rex *v.* Amphlitt, 4 B. & Cr. 35.)

If A. sends a manuscript to the printer of a periodical publication, and does not restrain the printing and publishing of it, and he prints and publishes it in that publication, A. is the publisher, and liable to an action. (Burdett *v.* Cobbett, 5 Dowl. 301. See Bond *v.* Douglas, 7 Car. & P. 626.)

Printing, * * unless qualified by circumstances, is *prima facie* a publishing, the manuscript must be delivered to the compositors. (Baldwin *v.* Elphinstone, 2 W. Black. Rep. 1037; Holt on Libel, 293; Trumbull *v.* Gibbons, 3 City Hall Recorder, 97.)

the possession of such writing, but permitting the writing, the characters inscribed, to be read by the other, is a publication in writing.

§ 106. Effigy resembles a writing, the material written upon, as distinguished from the subject-matter of a writing. An exposure of an effigy or a parting with the possession of it in such a condition that it may be seen by another is a publication.[1]

§ 107. The requisites of *an oral publication* are: (1) that the language be spoken to or in the presence of at least some one third person (§ 95). No possible form of words can be the basis of an action for slander if at the time of their utterance the only persons present are the speaker and the person whom or whose affairs the language concerns.[2] (2) The third person present must *hear* the language spoken.[3] Whether the third person present at the speaking did or did not hear the language spoken is, in every case, a question of fact. And this is not the less the rule, because where the speaking is in the presence of a third person, under such circumstances that he might have heard what was spoken, he may, as a rule of evidence, be assumed to have heard it, until it be shown that he did not hear.[4] The burden is on him who alleges a publi-

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[1] The civil law made a distinction not only between oral and written defamation but between a publication *by writing* and *by pictures*. (Heineccius, lib. 47, tit. 10.)

[2] Uttering slanderous words in the presence of the person slandered only is not actionable. (Sheffill *v.* Van Deusen, 13 Gray, 304; Brodrick *v.* James, 3 Albany Law J. 232, and see note to § 95, *ante*.)

[3] "If none heard the words it is no slander." (Viner's Abr. tit. Actions for Words L. b. 4; and see cases cited, 1 Caine's R. 582.)

[4] The word "publish," as applied to speech, implies that the language was spoken in the presence and hearing of others. (Watts *v.* Greenlee, 2 Dev. 115; Viner's Abr. tit. Actions for Words, L. *b.* 4; *contra*, Burton *v.* Burton, 3 Iowa, 316. See Goodrich *v.* Warner, 21 Conn. 432; 1 Hilliard on Torts, 319, *note*.) In slander it is sufficient if the words are said to have been spoken "in the presence" of others, (Brown *v.* Brashier, 2 Penns. 114.) Or in the presence and hearing of divers persons, or of certain persons named. (Burbank *v.* Horn, 39 Maine, 233, and see 1 W. Saund. 242, *n.* 1.) See § 324, *post*.

cation to establish that the third person heard the language spoken. (3) The third person must understand the language (§ 96). When hereafter we speak of an oral publication, or a publication orally, we shall intend a publication with the requisites above mentioned.

§ 108. The requisites of *a publication in writing* are (1) that the writing, the material written upon, be so exposed as that the subject-matter of the writing is *read* by at least some one third person (§ 101). No possible form of language in writing can be the basis of an action for libel if read only by the writer and the person whom or whose affairs the language concerns.[1] (2) The subject-matter of the writing must be *understood* by at least some one third person by whom it is read (§ 96). When hereafter we speak of a publication in writing, we shall intend a publication with the requisites above mentioned.

§ 109. The publication must be *prior* to the commencement of the action, and a publication prior to the commencenent of the action, should be proved.[2] Where a witness called to prove publication was unable to say whether the speaking the words referred to was before or after the date when the action was commenced, it was decided that his testimony was not admissible.[3] But it was held not to be a ground for arresting the judgment that it appeared on the face of the record that the writ issued prior to the alleged publication.[4]

§ 110. The place of publication may be within or

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[1] But delivery to the party libelled is a sufficient publication to support an indictment. (Phillips *v.* Jansen, 2 Esp. 624.) The moment a man delivers a libel from his hand and ceases to have control over it, there is an end of his *locus penitentiæ* the *injuria* is complete. (Holroyd J. Rex *v.* Burdett, 4 B. & Ald. 143.)

[2] Taylor *v.* Sturgingger, 2 Rep. Con. Ct. 367; Phila. &c., R. R. *v.* Quigley, 21 How. 202.

[3] Steward *v.* Layton, 3 Dowl. Pr. Cas. 430.

[4] Scovel *v.* Kingsley, 7 Conn. R. 284.

without the territorial limits of the State or country within which redress is sought. The decisions, so far as they go, all hold, that as a question of jurisdiction, it is immaterial whether the publication was within or without the territorial limits of the State or country within which redress is sought, and this on the ground that the wrong follows the person and may be redressed by civil action in any court having jurisdiction of the person at the time redress is sought. It is conceded, however, that as regards *crimes* no redress can be had in one State for a crime enacted within the territorial limits of another State, because a crime is a violation of the law of the State within which it is enacted. This concession seems to imply that for a wrong committed in one State there can be no remedy in another; because the right to remedy is based on a violation of some general prohibition of the law, and not like a remedy on contract for a breach of a private convention between the parties, which of course follows the persons of the parties to the convention.[1] The effect

[1] Mr. Stephens, in his "Treatise on Criminal Law," insists that a crime and a tort differ only as regards their consequences.

No court "administers justice in general" (De Bode *v.* Reg., 13 Ad. & El., N. S. 386), and "the laws of a State have no force *proprio vigore* beyond its territorial limits." (Hoyt *v.* Thompson, 5 N. Y. 340.) "If two persons fight in France, and both happening casually to be here [in England], one should bring an action of assault against the other, it might be doubtful whether such an action could be maintained here [in England]. * * * It might perhaps be triable only where both parties at the time were subjects." (Mostyn *v.* Fabrigas, 20 State Tr. 82; 1 Smith's Leading Cases.) In Molony *v.* Dows (8 Abb. Pr. R. 316) it was held at *nisi prius*, but after elaborate argument and deliberation, that an action for an assault in California could not be maintained in the courts of the State of New York. In McIvor *v.* McCabe (16 Abb. Pr. R. 319), it was held that the courts of New York had jurisdiction of an action for a personal injury committed in New Jersey by one citizen of that State upon another. As to action for tort committed in a foreign country, see Scott *v.* Seymour, 6 Law Times Rep. N. S. 607; 1 Hurl. & Colt. 219; 32 Law Jour. 61 Ex.; DeWitt *v.* Buchanan, 54 Barb. 31. "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must have been fulfilled. *First*, the wrong must be of such a character that it would have been actionable of committed in England * * * *Secondly*, the act must not have been justifiable by the law of the place where it was done," (Phillips *v.* Eyre, Law Rep. VI. Q. B. 29; and see s. c. Law Rep. IV. Q. B. 225; Barry *v.* Fisher, 39 How. Pr. R. 521.)

of the place of publication upon the construction of the language published, and as a question of *venue*, and as affecting the liability, will hereafter be considered.

§ 111. The *person who makes a publication* is a publisher. In the text books, and in reference to slander and libel, the term publisher is employed sometimes to signify

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"Of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction, but of such matters as are merely transitory and follow the person, we acquire a jurisdiction by the help of that fiction to which I have already alluded [the fiction of laying the venue], and we cannot proceed without it." (Eyre, C. J. Ilderton *v.* Ilderton, 2 H. Bl. 145, 162.) As to torts committed at sea. (Percival *v.* Hickey, 18 Johns. 257: Novion *v.* Hullett, 16 *id.* 327; Wilson *v.* McKenzie, 7 Hill, 95.)

To maintain an indictment for libel, the publication must be proved to have been made in the county laid in the indictment, all matters of crime being local. (Holt on Libel, 299; citing Rex *v.* Johnson, 7 East, 65.) In Trumbull *v.* Gibbons, 3 City Hall Recorder, 97, the libel was printed in Boston and published in New Jersey, but held the courts of New York had jurisdiction; and see Glen *v.* Hodges, 9 Johns. 67; Smith *v.* Bull, 17 Wend. 323; Johnson *v.* Dalton, 1 Cowen, 548; Gardner *v.* Thomas, 14 Johns. 134.

If one of our citizens goes into Canada and slanders his neighbor, an action will lie in this State. (Lister *v.* Wright, 2 Hill, 320; Hall *v.* Vreeland, 42 Barb. 543; 18 Abb. Pr. R. 182.)

An action for slander will lie, in Indiana, for words spoken in another State actionable at common law. (Offutt *v.* Earlywine, 4 Blackf. 460; Linville *v.* Earlywine, 4 Blackf. 469; Stout *v.* Wood, 1 *id.* 71.) And the same in Vermont (Langdon *v.* Young, 33 Verm. (4 Shaw,) 136.)

In an action of slander brought in Indiana, it will be presumed until the contrary be proved that the words were spoken in that State. (Worth *v.* Butler, 7 Blackf. 251.)

It is sometimes necessary to show a publication in a particular county. Where the defendant wrote letters in Ireland, and sent them to Middlesex county, England, to be printed and published, and the letters were there published, it was held to be a publication by the defendant in Middlesex county. (Rex *v.* Johnson, 7 East, 65: and to the like effect Rex *v.* Middleton, Str. 77; Keene *v.* Ruff, 1 Clarke (Iowa) 482.) Where A. wrote a letter and sent it by mail to B., in the county of B., and it was again sent by mail to the county of M., at which county B. received and read it, held to be a publication in the county of M. (Rex *v.* Watson, 1 Camp. 215; and see Rex *v.* Girdwood, East's P. C. 1116, 1120; Case of the Seven Bishops, 4 State Trials 304; Rex *v.* Burdett, 4 B. & A. 717; 2 Starkie on Slander, 39–43; Commonwealth *v.* Blanding, 3 Pick. 304.)

In an action for suspending a lamp before the plaintiff's house, intimating that it was a house of ill-fame, the parish in which the declaration states the house to have stood and the tort to have been committed, is to be considered as venue merely, and not as local description, and it is immaterial whether there be any such parish in existence. (Jefferies *v.* Duncombe, 2 Camp. 3; 11 East, 226.) And see Mersey Navigation Company *v.* Douglas, 2 East, 497.

the person who actually makes a publication, and sometimes the person who, not being the actual publisher, is liable for the publication; *is liable as publisher*. We shall always employ the term publisher in the sense of and to signify the person who actually makes the publication.

§ 112. *Republication* is a second or subsequent publication of the *same language*. *Repetition* is a publication of language of *the same import* or meaning, as the language of a previous publication. Repetition is a *subsequent publication* independent and distinct from the first publication. There may be a republication of a writing, the material written upon, there may be a repetition of the subject-matter of a writing, and there may be a repetition of oral language (speech), but there cannot be a republication of oral language.

§ 113. Speech is but sound, a mere vibration of the atmosphere, cognizable only by the auditory sense. From its nature it necessarily follows that the *same* sound cannot be repeated; a *similar* or a *like* sound may be produced, undistinguishable in every respect from the first, and of the like character and signification, but that will not be the same sound. One who repeats a word previously spoken does not utter the identical word, but a similar or like word: he repeats *a like* sound of *the same signification* as the first. The two sounds are separate and distinct, although each has the same meaning. Hence each publication of oral language is a new, distinct, and separate publication.

§ 114. As respects oral publications, the person who actually makes the publication, the publisher, and the person liable as the publisher, must be always one and the same person. Every speaker is the publisher of what he speaks, and is solely liable therefor. That the words spoken have been previously published by another, can neither relieve the subsequent speaker from his liability

for the publication made by him, nor impose any liability on the previous publisher. The act of publication is as to each publisher an entirely distinct act. Each person can be liable only for the publication made by him. If one makes an oral publication, and another repeats it, without authority from the first speaker, the first publisher is not liable for the repetition.[1] Besides that, the repetition is not a repetition of the same language (§ 113). The repetition is neither a necessary nor a natural and proximate consequence of the first publication. It is not an exception, but a corrollary of this rule, that where the repetition is privileged, the author of the defamation is liable for the consequences of such privileged repetition. The repetition is a natural consequence of the first publication. Thus, where the defendant made a defamatory communication to A. respecting the plaintiff, in the employ of his A.'s wife, which A. repeated to his wife, who in consequence dismissed the plaintiff from her service, held that the defendant was liable for the damages occasioned by the dismissal.[2]

§ 115. As respects a publication by writing, a libel not only the publisher but all who in anywise aid or are concerned in the production of the writing are liable as publishers; the publication of the writing is the act of all concerned in the production of the writing (§ 113). Thus, if one composes and dictates, a second writes, and a third publishes, all are liable as publishers, and each is liable as a publisher.[3]

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[1] Where A. uttered a slander of B. the wife of C., and B. repeated the slander to C., in consequence of which C. refused to cohabit with B., held that no action could be maintained against A.; the publication was not A.'s, and A. was not responsible for the consequences of it. (Parkins *v.* Scott, 6 L. T. N. S. 394; s. c. Perkins *v.* Scott, 1 Hurl. & Colt. 153.) But the person who originates the slander can only be liable for the special damage occasioned by his own communication of it. (Cates *v.* Kellogg, 9 Ind. 506; Dixon *v.* Smith, 5 Hurl. & Nor. 450; Fowles *v.* Bowen, 30 N. Y. 20; Ward *v.* Weeks, 7 Bing. 211; Cochran *v.* Butterfield, 18 N. Hamp. 115.)

[2] Derry *v.* Handley, 16 Law Times N. S. 263; and see *post*, § 202.

[3] All concerned in making a libel are alike liable. "The law denominates them

§ 116. The mere composing or writing any certain form of words, and keeping the writing and its contents confined to the custody and to the knowledge of the composer or writer, so that it is not communicated to any other person, does not render the composer or writer liable either to indictment or to civil action, for there is no publication. So, having or retaining possession of a writing, no matter by whom written, cannot amount to a wrong by the person so having or retaining possession of such writing; for as to him, at least, there is no publica-

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all makers." (Holt on Libel, 288, 289; 2 Starkie on Slander, 225; Bishop's Crim. Law, § 931 [814], citing Rex *v.* Drake, Holt, 425; Rex *v.* Paine, 5 Mod. 163; Rex *v.* Bear, Carth. 407; Rex *v.* Williams, 2 Camp. 646.) "All persons who concur and show their assent or approbation to do an unlawful act, are guilty; so that murdering a man's reputation by a scandalous libel may be compared to murdering his person; and if several are assenting and encouraging a man in that act, though the stroke was given by one, yet all are guilty of homicide." (Quoted by Kent, Ch. J., in Dale *v.* Lyon, 10 Johns. 461; Cochran *v.* Butterfield, 18 N. Hamp. 115.)

The publisher is equally responsible with the author of a libel. (Dexter *v.* Spear, 4 Mason, 115.) Printer and editor are both liable. (Watts *v.* Fraser, 7 Car. & P. 369; Rex *v.* Dover, 16 Charles II, 2 St. Tr. 547, Hargreaves Ed.) The proprietor of a newspaper is liable for defamatory matter, published in the form of an advertisement in his paper, although others are also liable for the same publication. (Harrison *v.* Pierce, 1 Fos. & Fin. 567), and the author of a libel may be sued for its publication, notwithstanding that the publisher of the libel has been sued in respect of it. (Frescoe *v.* May, 2 F. & F. 123.) The responsibility of the writer of a private letter for the publication of its contents, is not limited to the consequences of a communication of them to the person to whom the letter is addressed, but extends to the probable consequences of thus putting the letter in circulation, (Miller *v.* Butler, 6 Cush. 71.)

Where, in case for oral and written slander, to support the count on the latter, a reporter to a newspaper was called, who proved that he had written down from the defendant's mouth (who said at the time it would make a good case for the newspapers) the statement which he afterwards sent to the editor, and that a paragraph, which afterwards appeared, was in substance the same, held, that what was so published in consequence of what passed with the defendant might be considered as published by the defendant; but to prove that what was published was the same as that given to the editor by the reporter, could only be done by producing the written paper itself. (Adams *v.* Kelly, 1 Ry. & M. 158.)

Two persons having participated in the composition of a libelous letter written by one of them, which was afterwards put into the post-office, and sent by mail to the person to whom it was addressed; such participation was held to be competent and sufficient evidence to prove a publication by both. (Miller *v.* Butler, 6 Cush. 71.) And see Reg. *v.* Cooper, 15 Law Jour. Rep. Q. B. 206; 8 Q. B. 533; Parkes *v.* Prescott, Law Rep. IV Ex. 168.

tion.[1] The composer and the writer of matter which is afterwards published is liable as publisher for such publication.[2] And this liability, *as we suppose*, is not to be qualified by the circumstances under which the publication occurred. It would be no excuse to say that the writing was kept guarded and concealed, and was taken from him by force, or obtained from him by fraud or by the procurement of the party whom or whose affairs it concerns.[3] If the matter written is of an injurious tendency, and any injury ensues from its publication, the composer and the writer are liable, not because of any imputed or presumed malice in making the publication, but because, unless such a writing had been created, the injury occasioned by it could not have happened; creating the writing and preserving it were wrongful acts, for the necessary or natural and proximate consequences of which the authors are liable on the general principle that a wrong doer cannot excuse his act, by reason of the act whether rightful or wrongful of others.[4]

§ 117. The material written upon, and the subject-matter inscribed upon such material, are substantial entities. The very identical writing may be passed from

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[1] Until publication, possession of a libel is no more than the possession of a man's thoughts. (Rex *v.* Almon, 5 Burr. 2689.) So long as the writer retains possession of the writing he has a *locus penitentiæ;* but "The moment a man delivers a libel from his hands, and ceases to have control over it, there is an end of his *locus penitentiæ;* the *injuria* is complete, and the libeler [the writer] may be called upon to answer for his act" (Rex *v.* Burdett, 4 B. & Ald. 143; Holroyd, J.); and see 5 Mod. 167; Holt on Libel, 294; 2 Starkie on Slander, 228; Rex *v.* Rosenstein, 2 Car. & P. 414.

[2] Holt on Libel, 289; Bond *v.* Douglass, 7 C. & P, 626; Miller *v.* Butler, 6 Cush. 71; Burdett *v.* Cobbett, 5 Dowl. 301; Giles *v.* The State, 6 Geo. 276.

[3] Where the plaintiff sent his agent to the office of the defendant, the publisher of a newspaper, to purchase a copy of the paper, held that a sale to such agent was a publication to a third person. (Brunswick *v.* Harmer, 14 Q. B. 185; see King *v.* Waring, 5 Esp. Cas. 13; Smith *v.* Wood, 3 Camp. 323; Thorn *v.* Moser, 1 Denio, 488; Griffiths *v.* Lewis, 7 Ad. & Ell. N. S. 61; *contra*, see Sutton *v.* Smith, 13 Miss. 120; Allen *v.* Crofoot, 2 Wend. 515; Gordon *v.* Spencer, 2 Blackf. 286; Hayes *v.* Leand, 29 Maine (16 Shep.) 233; and see in notes to §§ 121, 123, *post.*)

[4] Collins *v.* Middle Level Com'mrs, Law Rep. IV, C. P. 279; affirming the principle in Scott *v.* Shepherd, 2 W. Bl. 892.

hand to hand, and each such passage is as well a separate and distinct publication as a republication of such writing. Every person concerned in making such a publication is liable not alone for the consequences of that publication, but for the consequences of any subsequent publication of the *same writing*. One and the same writing may be many times published at the same or at several and distinct places, and may have many publishers; and many persons may be liable as publishers at one and the same time or at several times. The subject-matter of a writing cannot be *republished* apart and separate from a republication of the writing, the material written upon. Apart from the material on which the matter is inscribed, it is as impossible to republish the same subject-matter of a writting as it is to republish the same sound or oral language of speech. If one copies the subject-matter of a writing upon another piece of material, the copy is no more the SAME subject-matter as the subject-matter copied from, than is the repetition of a sound an uttering of the same sound. The copy is not the same writing but another—a second and independent writing, having *the like* but not *the same* subject-matter. A publication of this copy would have no other connection with the original than that it contained *the like* subject-matter. The persons liable for the publication of the first writing would not be liable for the publication of the second or the copy, and the persons responsible for the publication of the second writing would not be responsible for the publication of the original writing. The publication of the second writing is neither a necessary nor a natural and proximate consequence of the publication of the first writing, nor is a publication of the first writing a necessary or a natural and proximate consequence of the publication of the second writing. It may be urged that but for the publication of the first writing the second might not, or perhaps could not, have come into existence. The author of the second writing could not have possessed the material or knowledge requisite for its

production. The same objection would apply, and with equal force, to an oral publication. If the first speaker had not uttered the words the second speaker could not have repeated them. We know such an objection would be unavailing. Again, it may be urged that the one who dictates the language forming the subject-matter of a writing, which is afterwards published by another, is responsible for such publication, either solely or jointly with the publisher, or that the writing first published is equivalent to a dictation of the language of the second writing; but this is not so; the dictation, to incur any responsibility for a subsequent publication of the language dictated, must be made with *an intent or a request* that the language so dictated shall be subsequently published (§§ 114, 115, 118).

§ 118. There may be a joint publication by writing, but, for the reasons heretofore stated (§ 113), there cannot be a joint oral publication. If two or more utter the *like* words, either simultaneously or separately, it is not a joint publication, but a several publication by each, for which each must be sued separately, and for which they cannot be sued jointly.[1] Within this rule husband and wife are considered as separate individuals. If husband and wife utter the like words, either simultaneously or separately, there are two publications—a separate publication by each (§ 304). For the words uttered by the husband he must be sued alone; for the words uttered by the wife,

[1] A joint action cannot be maintained against two or more persons for slander (Webb *v.* Cecil, 9 B. Mon. 198; Forsyth *v.* Edmiston, 2 Abb. Pr. R. 431; 5 Duer, 653; Chamberlaine *v.* Willmore, Palm. 313; 1 Bulst. 15; 2 W. Saund. 117 *a*; The State *v.* Roulstone, 3 Sneed, 107; 2 Bish. Crim. Pro. § 766; Patten *v.* Gurney, 17 Mass. 182; Heard on Libel, 222, note 1; Chamberlain *v.* White, Cro. Jac. 647.) "It is an established rule, both here and in England, that two persons cannot join as pursuers in an action of calumny; but if defamatory language is published of partners in trade, whereby they are injured in their trade, a joint action will lie at the suit of the partners; and, upon an extension of the same principle, it has been determined that a body corporate or an association of individuals may be injured by scandal, and may, accordingly, prosecute for redress of it. (Society of Solicitors *v.* Robertson, November 16, 1781, Mor. 13, 935, Shearlock *v.* Beardsworth, December 20, 1816, 2 Mur.

the husband and wife must be sued together.[1] Two or more may agree together (conspire) in composing a set of words which one or both shall speak; that is to say, two or more may conspire to injure another by an oral publication of language; for this the remedy would be, not an action for slander, but an action for a conspiracy to defame.[2]

§ 119. Where the publication is the joint act of two or more, they may be sued jointly or separately; if sued separately, the plaintiff can have but one satisfaction, but may elect *de melioribus damnis*. Thus, where A. brought an action of libel against B., who pleaded *puis darrein continuance*, that he was a partner with C. in the printing and publishing the newspaper which contained the libel, and that A. brought a previous action against C. for the same identical publication, and recovered a judgment which had been satisfied, &c. On demurrer this was held a good plea, and that the plaintiff could have but one satisfaction, but might elect *de melioribus damnis*.[3]

§ 120. A publication, the act of publishing, must be upon some occasion (§ 50), and must be voluntary or involuntary (§ 67). Liability as publisher depends upon the occasion and upon whether, as to the person sought to be charged, the publication was voluntary or involuntary, and generally upon the principles to which reference has heretofore been made (§§ 50, 67, 68, 70). In the text

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Rep. 19.)" Borthwick on Libel, 174.—It is impossible for three men to make arbitrament by word of mouth, because it cannot be jointly pronounced. (Lawson's Case, Clayt. 17, A. D. 1663; and see Billings *v.* Russell, 8 Boston Law Rep. N. S. 699.)

[1] (Tait *v.* Culbertson, 57 Barb. 9.) There must be separate actions for words spoken by a husband and a wife. (Penters *v.* England, 1 M'Cord, 14; Malone *v.* Stillwell, 15 Abb. Pr. R. 425; Swithen *v.* Vincent, 2 Wils. 227.) Husband and wife may be jointly sued for a libel published by them jointly. (Catterall *v.* Kenyon, 3 Q. B. 310; Keyworth *v.* Hill, 3 B. & Ald. 685.) See Parties, *post*.

[2] See 2 Hilliard on Torts, 444, 458 *n.*; 8 Barr, 237; 10 *id.* 369; 11 Met. 356.

[3] Thomas *v.* Rumsay, 6 Johns. 26; Brown *v.* Hirley, 5 Up. Can. Q. B. R. (O. S.) 734; Webb *v.* Cecil, 9 B. Mon. 198.

books and reports much is said on the subject of privileged publications, employing the term publication to mean as well the act of publishing as the matter published; and these privileged publications are divided into such as are *absolutely* privileged and such as are *conditionally* privileged. Reserving the subject of privileged publication to be hereafter considered at length, we limit ourself here to stating that *all involuntary* and *some voluntary* publications are privileged.

§ 121. Where a closed paper is given to an employé to deliver to another, it becomes the duty of the employé to deliver such paper as directed, without inspecting its contents, and in making the delivery without ascertaining the contents of the paper, he performs a duty; and, as the performance of a duty is an involuntary act (§ 39), and cannot amount to a wrong (§ 42), if it happen that the paper contained defamatory matter, the employé incurs no liability. The act of publishing *defamatory matter* was as to him *involuntary*. He did not know, and was not under any obligation to know, the contents of the paper carried and delivered by him. He could have known the contents of the paper only by a violation of his duty; having simply performed his duty, no liability attached to him.[1] But

[1] In Nutt's case, as reported Barnard. 306, it is said: if a servant carries a libel for his master, he certainly is liable for what he does, though he cannot so much as read or write. Mr. Starkie (2 Starkie on Slander, 29, note *f*), referring to this *dictum*, says: "It is impossible not to dissent from this doctrine, so expressed, without the qualification added that the servant had some reason to know that he was discharging an illegal mission." That the defendant could not read, and therefore was ignorant of the contents of the paper published may be urged in mitigation. (Rex *v.* Holt, 5 T. R. 444.) To constitute a publication such as will render the publisher liable to an action, the publication must be *knowingly*. (Layton *v.* Harris, 3 Harring. 406.) Intentional. (Viele *v.* Gray, 10 Abb. Pr. R. 12; 18 How. Pr. R 567.) One is not liable for a publication *inadvertently*. (Rex *v.* Abingdon, 1 Esp. Cas 228.) As by delivering by *mistake* a paper out of his study. (5 Mod. 167; Holt on Libel, 290.) Or if it be stolen from him. See Weir *v.* Hoss, 6 Ala. 881; Barrow *v.* Lewellin, Hob. 62; 1 Hill. Torts, 321, note 7; § 116, *ante*. Reading a libel in the presence of another without knowing it before to be a libel, with or without malice, does not amount to a publication. (4 Bac. Abr. 458; Holt on Libel, 290.) But if he who has either read a libel himself or has heard it read by another, do afterwards maliciously read or

if, in such a case, the employé does in fact know the contents of the paper, he cannot excuse himself by saying he carried and delivered it as agent or employé (§ 67). Ordinarily it would be said that the non-liability of the employé, in the instance above put, arose from the absence of *malice* on his part in making the publication; but this can only mean that he had a legal excuse for performing the act, namely, that the act, so far as it was wrongful, was as to him involuntary. This is the true ground for the decisions in which the non-liability is said to be the absence of malice. Decisions that cannot be explained on this ground were either erroneously decided or decided upon erroneous grounds. The true ground for the decision in Smith *v.* Ashley[1] was, the absence of "*conscious violation*" of law, and "*culpable knowledge.*"[2] The work of fiction pub-

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repeat any part of it in the presence of others, or lend or show it to another, he is guilty of an unlawful publication of it. (Hawk. P. C. c. 73, § 10; Holt on Libel, 291.) Reading a libel by command of his father or master is not an actionable publication —so said Comyn's Dig. tit. Libel, B. II, and cited George on Libel, 162.

If a man deliver *by mistake* a libelous paper out of his study, he would probably be held liable civilly, for the publication was by his carelessness. (Mayne *v.* Fletcher, 4 M. & Ry. 312.)

"The mere act of communicating that which is slanderous will not subject a party even to civil liability without some degree of culpability on his part. If, for instance, a servant or agent were in the ordinary course of his duty to deliver a sealed libel, without any knowledge of its contents, though he were thus the actual instrument of publication, yet if he acted but as the agent of another, without any reason for suspecting that any wrong was intended, he would not subject himself to any civil, still less to any criminal responsibility." (1 Starkie on Libel, 226, [227].)

In an action against the defendant for publishing libels, it appearing that five packets, addressed to individuals and enclosed in one addressed to him, had been received at the coach-office where he was porter, and he delivered them; held that if the jury found that he did so in the course of his business, and in ignorance of the contents, he was not liable; but being *prima facie* liable, it was for him to show such ignorance. (Day *v.* Bream, 2 M. & Rob. 54.)

[1] An action for a libel cannot be maintained against the publisher of a newspaper, if he has no knowledge, at the time of publication, that the article complained of is libellous. Hence, if he publishes an article which he believes to be a fictitious narrative, or mere fancy sketch, and does not know that it is applicable to any one, he cannot be held responsible, although it was intended by the writer to be libellous, and to apply to the party who brings the action. In such case, the writer only is answerable to the party libeled. (Smith *v.* Ashley, 11 Met. 367.)

[2] See note to § 87, *ante*. "He who shall be convicted in the said case either ought

lished had nothing on its face to indicate that it reflected upon any individual or his affairs; the publisher did not know, and had no means of knowing, that it reflected on any individual or his affairs; in so far, therefore, as it did reflect upon any individual, it was as to the publisher an involuntary act, equally as much as the unconscious delivery by an employé of defamatory matter by the direction of his employer. This subject will be further discussed hereafter, when we come to treat of defences.

§ 122. Upon the principles of law condensed in the expression *respondeat superior*, one is responsible not only for what he does or omits to do in his own proper person, but also for all that his *agents* may do or omit to do in and about his business. Every one is charged with the duty to exercise such a vigilance in the selection of agents, animate and inanimate, as are competent and adequate to the performance of the business they may be required to transact and the ends they may be designed to accomplish; he must exercise such a control over them that in the transaction of his business they neither do or omit to do any act amounting to a wrong. He cannot escape this liability by omitting to exercise this vigilance; for such omission is itself negligence. It is upon this principle, and not upon any presumption of malice, that an employer or principal is held responsible for the act of his servant or agent.[1]

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to be a contriver of the libel, or a procurer of the contriving of it, or a *malicious* publisher of it, *knowing it to be a libel*." (9 Co. 59, Mo. 813; George on Libel, 107.)

[1] Legal criminality is merely legal responsibility, and may exist where there is no moral criminality whatever. (Holt on Libel, 53.) Malice, in legal understanding, implies no more than *wilfulness* (*id.* 55, note 3, p. 123, *ante*), and between *negligence* and *wilfulness* there is no difference but of degree. (Bramwell B. Mangan *v.* Atterton, Law Reports, 1 Ex. 240.) Negligence embraces acts of commission as well as of omission, and diligence implies action as well as forbearance to act. (Grant *v.* Mosely, 29 Ala. 302.) But the only principle on which a man can be rendered liable for the wrongful acts of another, is that such a relation exists between them that the former, whether he be called principal or master, is bound to control the conduct of the latter whether he be agent or servant. The maxim of the law is *respondeat superior*. (Blackwell *v.* Wiswall, 14 How. Pr. R. 258.)

The rule of liability [of a principal for the acts of his agents], is not based upon

§ 123. The proprietor of a newspaper is responsible for all that appears in its columns, although the publication may have been made without his knowledge, in his absence, and contrary to his orders. His liability is not on the ground of his being the publisher, nor of being presumed to be the publisher, but because he is responsible for the acts of the actual publisher.[1]

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any presumed authority in the agent to do the acts, but upon the ground of public policy. (Lee *v.* Village of Sandy Hill, 40 N. Y. 448; Farmers' B'k *v.* Butchers' B'k 16 N.Y. 133.) The wrongful act is the servant's in fact and the principal's by construction. (Bruff *v.* Mali, 34 How. Pr. R. 344.) It is said to be the law that a master is responsible for all wrongful acts of his servant, within the scope of his employment and in executing the matter for which he was engaged at the time. See Allen *v.* London & S. W. R'way, Law Rep. VI, Q. B. 67.

In an action for a libel contained in a letter: Proof that it was written by defendant's daughter, who was authorized to make out his bills and write his general letters of business, is not sufficient, unless it can be shown that such libel was written with the knowledge of or by the procurement of the defendant. (Harding *v.* Greening, 1 Moore, 477; 1 Holt N. P. 531; 8 Taunt. 42.) Writing the letter was not within the scope of the daughter's authority to act for her father. (*Id.*) A parent is not liable as such for the wrongful acts of his child. (Tifft *v.* Tifft, 4 Denio, 175, and see Moon *v.* Towers, 8 Com. B. N. S. 611.)

If an attorney introduces slanderous matter into the pleadings, without the direction of his client, the client is not responsible. (Hardin *v.* Cumstock, 2 A. K. Marsh, 480.)

[1] The proprietor of a newspaper is responsible for whatever appears in its columns. It is unnecessary to show that he knew of the publication, or authorized it. (Huff *v.* Bennett, 4 Sand. 120.) For he is liable even though the publication was made in his absence and without his knowledge by an agent to whom he had given express instructions to publish nothing exceptionable, personal, or abusive, which might be brought in by the author of the libel. (Dunn *v.* Hall, 1 Carter (Ind.), 345; 1 Smith, 288.) And see Curtis *v.* Mussey, 6 Gray (Mass.), 261.

An action for a libel lies against the proprietor of a gazette edited by another, though the publication was made without the knowledge of such proprietor. (Andres *v.* Wells, 7 Johns. 260.)

But if a printing press and newspaper establishment be assigned to a person merely as security for a debt, and the press remains in the sole possession and management of the assignor, the ownership of the person holding the security or lien is not such as will render him liable to an action as proprietor. (*Id.*)

A receiver of a newspaper establishment, appointed to take charge thereof, and continue the publication of the newspaper, would be responsible for any defamatory matter published in the newspaper while the same was under his control. (Marten *v.* Van Schaick, 4 Paige, 479.) A receiver was appointed to carry on the publication of a newspaper in Dayton *v.* Wilkes, 17 How. Pr. R. 510.

The editor and publisher of a newspaper is answerable in law, if its contents are libelous, unless the libelous matter was inserted by some one without his order and against his will. (The Commonwealth *v.* Kneeland, Thacher's Crim. Cas. 346.)

§ 124. The liability of the proprietor of a newspaper is shared in common with the proprietor of a printing press, a printer, book publisher, and bookseller. The proprietor of a bookstore is liable for the contents of every book and paper sold in his store.[1]

Rex *v.* Gutch, 1 Moo. & Mal. 433, on the trial of defendant for publishing a libel in a newspaper of which he was the proprietor, it was contended on his behalf that he was not liable, because he took no part in the publication of the newspaper; but he was held liable and the court said: "A person who derives profit from and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears;" and see Rex *v.* Alexander, 1 Moo. & Mal. 437; 3 Albany Law Jour. 46, and see Atty. Genl. *v.* Siddon, 1 Cr. & Jer. 220.

[1] "It is not material whether the person who disperses libels is acquainted with their contents or otherwise, for nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them. (2 Starkie on Slander, 30, note *z.*; Moore, 627; Wood's Inst. 431; Bac. Abr. tit. Libel, 458.) See note, p. 154 *ante.*

Nutt's Case, Fitzg. 47; Barnard. 306: The defendant was tried for publishing a libel. It appeared in evidence the defendant kept a pamphlet shop, and that the libel was sold in defendant's shop, by her servant, for her account, in her absence, and that she did not know the contents of it, nor of its coming in or going out. This was held to be a publication by the defendant, but a jury was withdrawn.

Rex *v.* Dodd, 2 Sess. Cas. 33: The defendant was tried for publishing a libel. It was insisted for the defendant that she was sick, and that the libel was taken into her house without her knowledge; this was held no excuse, the law presumed her acquainted with what her servant did.

In Rex *v.* Almon, 5 Burr. 2689, the liability of booksellers was much discussed, and the court expressed an opinion that the sale of a libel in a booksellers's shop was *prima facie* evidence of a publication, though not so conclusive but that it might be rebutted by circumstances. It is said (2 Starkie on Slander, 34); "But the defendant may rebut the presumption by evidence that the libel was sold contrary to his orders, or clandestinely; or that some deceit or purprise was practiced upon him; or that he was absent under circumstances which entirely negative any presumption of privity or connivance." And reference is made to Rex *v.* Almon, *supra*, and to Woodfalls' Case, where the publication was by a servant of the defendant, the defendant being at the time within prison walls. In Rex *v.* Fisher, 1 Moo. & Mal. 433, it is said the presumption arising from proprietorship of a newspaper may be rebutted, and an exemption established. If the publication is made without the consent of the writer, the offence is not complete as to him. (Weir *v.* Hoss, 6 Ala. 881. See Holt on Libel, 294.) As if the writing be stolen from him. (Mayne *v.* Fletcher, 9 B. & C. 382.)

In Chubb *v.* Flanaghan, 6 Car. & P. 431, it was held that if a publication consists in merely selling a few copies of a periodical in which the libel was contained among the articles, it was a question for the jury whether the defendant *knew* what he was selling.

CHAPTER VII.

CONSTRUCTION OF LANGUAGE.

Actionable quality of language dependent upon its construction—All language ambiguous or unambiguous—Difficult to determine what is and what is not ambiguous—Points upon which ambiguity arise—Causes of ambiguity—Ambiguity, how explained—Different effect of language concerning a person and of language concerning a thing—Materiality of questions, what person or thing affected, and whether the person is affected as an individual merely, or in some acquired capacity—Principles of construction; before verdict—after verdict—Examples of construction—Divisible matter.

§ 125. Language as a means for effecting a wrong must be either such as *is actionable* or such as *is not actionable.* To which of these divisions any particular language is to be referred, may depend upon the construction of the language in question. Anterior, therefore, to an inquiry into what language is and what language is not actionable, it is proper here to consider at least the principal rules by which alleged defamatory language is construed. The question as to when the construction is with the court, and when by the jury is discussed in a subsequent chapter (§§ 281–286).

§ 126. Language may be ambiguous or unambiguous.[1]

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[1] "Words or signs may be divided into three classes: (1) those which bear an obvious and precise meaning on the face of them; as if A. say to B., you *murdered* C.; (2) those which on the face of them are of dubious import, and are capable either of a criminal or innocent meaning; as if A. says to B., you were *the death* of C.; (3) those which are *prima facie* and abstractedly innocent, and which derive their offensive quality from some collateral or extrinsic circumstances; as if A. says to B.,

It is not easy in every case to determine what is ambiguous and what is unambiguous language. Language may be unambiguous on its face, which, by reason of some circumstances connected with it, is in fact ambiguous. This is always the case with language used ironically. When language is unambiguous on its face it must be construed as unambiguous, unless its ambiguity be shown; and on the one who asserts the ambiguity of language unambiguous on its face, is the burden of establishing the ambiguity.[1]

§ 127. When language is ambiguous, the ambiguity may be either (1) whether the language concerns a person or a thing, or (2) what person or what thing it concerns, or (3) if it concerns a person does it concern him as an individual merely or in some acquired capacity, as in an office, trade or profession; (4) what is the import or signification of the language, and (5) is the charge or matter divisible or indivisible.

§ 128. The ambiguity may be patent or latent, that is to say, the ambiguity may be inherent in the language and apparent upon its face, or the ambiguity may arise by reason of the language in question being connected with some other language or event in such a manner as that its

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you *did not murder* C., which words, from the ironical manner of speaking them, may convey to the hearers as unequivocal a charge of murder as the most direct imputation." (1 Starkie on Slander, 46.)

[1] "Where the words of themselves impute a larceny, and are unaccompanied by an explanation showing the hearers that they were not so intended, the defendant must show that they referred to a transaction that was not larceny, and were so understood by all who heard them. And where the plaintiff had taken wood through mistake, and the defendant, knowing the excuse for taking it, persists in charging him with stealing, in reference to such taking, he cannot fall back and rest upon the plaintiff's innocence." (Phillips *v.* Barber, 7 Wend. 439.)

"As doubtful or apparently innocent words may by circumstances be shown to be actionable, so may words apparently actionable be explained by circumstances to have been intended and understood in an innocent sense. Thus, though the defendant should say, Thou art a murtherer, the words would not be actionable if the defendant could make it appear that he was conversing with the plaintiff concerning unlawful hunting, when the plaintiff confessed that he killed several hares with certain engines, upon which the defendant said, Thou art a murtherer, meaning a murtherer of hares so killed. 4 Co. 13." (1 Starkie on Slander, 98.)

accustomed signification is affected and changed by such other language or event.

§ 129. The ambiguity of language unambiguous upon its face is shown, and the ambiguity of language in every case is explained, by introducing the other language or event which exhibits or which explains the ambiguity, and by alleging the supposed true meaning of the language in question. The manner by which ambiguity is shown and explained is by allegations in pleading, termed averments, colloquia, and innuendoes, the nature and offices of which several allegations will be considered under the head of Pleading.[1]

§ 130. Whether the language concerns a person or a thing, *i. e.* the affairs of a person (§§ 25, 27, 28), is material in this respect: that language when it concerns a person, and is discommendatory, is always, in the absence of any evidence to the contrary, regarded as *uncalled for*, as published without any lawful excuse, and as not to be believed or considered as true unless its truth be established; or, as the phrase is, such language is presumed to be malicious and false. But as to language concerning a

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[1] An *averment* is to ascertain that to the court which is generally or doubtfully expressed, so that the court may not be perplexed of *whom*, or of *what*, it [the language] ought to be understood, and to add matter to the plea to make doubtful things clear. A *colloquium* serves to show that the words were spoken in reference to the matter of the averment. An *innuendo* is explanatory of the subject-matter sufficiently explained before, and it is explanatory of such matter only; for it cannot extend the sense of the words beyond their own meaning unless something is put upon the record for it to explain. (Van Vechten *v.* Hopkins, 5 Johns. 220.)

It seems that in some instances where the language is unambiguous on its face the plaintiff will not be allowed to treat it as ambiguous and give it a meaning different from that it ordinarily bears. Thus the words spoken of a dyer were "Thou art not worth a groat," the plaintiff alleged that at E., where the words were spoken, they were all one as calling him Bankrupt. The court held the averment idle, because the words in themselves imply a plain and intelligible sense. (Meade *v.* Axe, Mar. 15, pl. 37.) "It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning." (McCluskey *v.* Cromwell, 11 N. Y. 601; Bartlett *v.* Robinson, 6 Trans. App. 166.)

thing no such presumption is indulged; and upon those who allege language concerning a thing to be false and malicious is the burden of establishing those conclusions by other evidence than that afforded by a mere publication of the language. And besides, to give a cause of action for language concerning a thing, damage general or special must in all cases be alleged and proved.[1]

While a distinction has been actually maintained between language concerning a person and language concerning a thing, the essential grounds of the distinction seems not to have been clearly, nor indeed rightly, apprehended. That branch of the law of libel known as "Slander of Title," has been regarded as something distinct from Slander and Libel, properly so called, whereas in reality slander of title is but a portion of that division of the law relating to wrongs by language which includes language concerning things.[2] The rules relating to slander of title apply to all language concerning things, but where the language concerns both a person and a thing, it is governed by the rules which relate to language concerning

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[1] See Swan *v.* Tappan, 5 Cush. 104; Ingram *v.* Lawson, 6 Bing. N. C. 212; 8 Scott, 571; Evans *v.* Harlow, 5 Q. B. 624; Kendall *v.* Stone, 5 N. Y. 14, reversing s. c. 2 Sand. 269; Hargrave *v.* Le Breton, 4 Burr. 2422; Smith *v.* Spooner, 3 Taunt. 246; Bailey *v.* Dean, 5 Barb. 297; Linden *v.* Graham, 1 Duer, 670; Tobias *v.* Harland, 4 Wend. 537; McDaniel *v.* Baca, 2 Cal. 326; Hamilton *v.* Walters, 4 Up. Can. Q. B. Rep. O. S. 24.

[2] Debated if *slander of title* within statute 21 Jac. 1, ch. xvi, actions on the case *for slander*, held by three judges against one, that it was not; "that action on the case for slander" referred to the person of a man and not to the title of lands. For this is not properly a slander but a cause of damage. (Lowe *v.* Harwood, Cro. Car. 140.) "An action for slander of title is not properly an action for words spoken or libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. This action is ranged under that division of actions in the Digests and other writers on the text law, and is so held by the courts at the present day. Malachy *v.* Soper, 3 Bing. N. C. 371; 3 Scott, 723." (Heard on Libel, § 59.) "An action of slander of title is a sort of metaphorical expression." (Maule, J., Pater *v.* Baker, 3 C. B. 831.) "The cause of action is denominated slander of title by a figure of speech, in which the title to land is personified and made subject to many of the rules applicable to personal slander, when the words in themselves are not actionable." (Gardiner, J., Kendall *v.* Stone, 5 N. Y. 14; see *post*, note to § 150.)

the person. The question whether the language concerns a person or a thing arises in cases of alleged privileged publications in the form of criticisms on books, works of art, or places of public entertainment. It must be determined in those cases whether in point of fact the language of the criticism was concerning the thing: the book, the work of art, the entertainment, or concerning the person: the author, the artist, or the proprietor of the place; and according to the decision of that question may the language be, or not be, actionable. We shall advert to this hereafter, in treating of the actionable quality of language concerning things, and of defences (§§ 203, 254).

§ 131. What person or what thing the language concerns is material; as upon the answer to that question depends whether the party complaining has, or has not, any right to redress. Of course unless the language concerns either the person or the affairs of the person complaining, no wrong can have been done him of which he can rightfully complain[1] (§ 343).

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[1] In action for scandalous words it is requisite that "the person scandalized be certain." (James *v.* Rutledge, 4 Rep. 17 b.) "No writing whatever is to be esteemed a libel unless it reflects upon some particular person," (Hawk. P. C., c. 79, § 9.) After quoting the foregoing sentence, Holt (Holt on Libel, 246) adds: "This is unquestionably true, as it relates to the action on the case for slander, in which the party complaining must show himself to be meant by the libel." (Holt on Libel, 247; Harvey *v.* Coffin, 5 Blackf. 566.) It is not material whether the person is described nominally or indirectly, provided his identity be ascertained. (Sumner *v.* Buel, 12 Johns. 475.) Identity is presumed from identity of name. (Jackson *v.* Goes, 13 Johns. 518; Jackson *v.* King, 5 Cow. 237; Jackson *v.* Cody, 9 Cow. 140; Hamber *v.* Roberts, 18 Law Jour. R. (N. S.) 250, C. P.; 7 C. B. 860; Sewall *v.* Evans, 4 Q. B. 626; Simpson *v.* Dismore, 9 M. & W. 47, 1 Dowl. P. C. N. S. 357; Hatcher *v.* Rocheleau, 18 N. Y. 86, but see Jackson *v.* Christman, 4 Wend. 277; Whitlocke *v.* Musgrove, 1 C. & M. 511; Jones *v.* Jones, 9 M. & W. 75; Greenshields *v.* Crawford, *id.* 314; 1 Dowl. P. C. N. S. 439.) Where the language is not applicable to the plaintiff (does not concern the person) no averment or innuendo can make it so. (Solomon *v.* Lawson, 8 Q. B. 823; Ingram *v.* Lawson, 6 Bing. N. C. 212; 8 Scott, 571; Dottarer *v.* Bushey, 16 Penns. 208; Swan *v.* Tappan, 5 Cush. 104; Vin. Abr., Act. for Words, H. b. 12, 13.) Where the language is applicable to the plaintiff, although not so upon its face to maintain an action therefor he must by *averment* introduce such facts as make it apparent that persons who knew him would, on hearing or reading such language, perceive its application to him. (Miller *v.* Maxwell, 16 Wend. 9.)

§ 132. When the language concerns a person, it is material further to inquire whether it concerns him as an individual merely, or in some acquired capacity, as in an office, trade or profession, because language which would not be actionable if it concerned one as an individual merely, may be actionable if it concerns him in his office, trade, or profession (§ 179).

He cannot show the application of the language to himself by an innuendo alone. (Wilson *v.* Hamilton, 9 Rich. Law (So. Car.), 382; Maxwell *v.* Allison, 11 S. & R. 343; Turner *v.* Merryweather, 7 C. B. 251; Tyler *v.* Tillotson, 2 Hill, 507; see § 343, *post.*) Thus it is not sufficient to allege that the defendant said, "R. saw a *young man* (meaning the plaintiff) ravishing a cow." (Harper *v.* Delph, 3 Ind. 225.) Or, W. *or somebody* altered the indorsement on a note. (Ingalls *v.* Allen, Breeze, 233.) I know of but one man who owes me enmity enough to do such a thing, and you know whom I mean. (Robinson *v.* Drummond, 24 Ala. 174.) A. was supervisor of an election, at which there was false swearing. (Lewis *v.* Soule, 3 Mich. 514.) And held that the postmaster of J. could not maintain an action for words spoken of a missing letter containing the resignation of one M.: "I do not think M.'s resignation has gone to Washington. I have no doubt it was embezzled at J." (Taylor *v.* Kneeland, 1 Doug. 67.) For the words, "All the bravery you (A.) ever showed was sleeping with your sisters," held that the sisters of A. could not sue. (Mallison *v.* Sutton, 1 Smith (Ind.) 364.) For calling W. a bastard, the mother of W. could not sue for the imputation upon her without proper averments connecting the allegation with her. (Maxwell *v.* Allison, 11 S. & R. 343.) An action may be supported for language in which the plaintiff is described directly or indirectly, though his name is not given. In which case the whole of the publication must be considered, in determining whether the averments be sufficient to make it applicable to the plaintiff (Cook *v.* Tribune Association, 5 Bl. C. C. 352), with proper averments showing the plaintiff to be intended, one may bring an action for words concerning on their face "his *friend*" (Clark *v.* Creitzburgh, 4 M'Cord, 491); or the "surgeon of whiskey memory" (Miller *v.* Maxwell, 16 Wend. 9); or the "man at the sign of the Bible" (Steele *v.* Southwick, 9 Johns. 214); or, O. B. (O'Brien *v.* Clements, 16 M. & W. 159); or "desperate adventurers" (Wakley *v.* Healey, 18 Law Jour. 241, C. P.) "The writer in the *Register* who was deprived of a twopenny justiceship for malpractice in packing a jury" (Mix *v.* Woodward, 12 Conn. 262); and see "One who edits the *Times*" (Tyler *v.* Tillotson, 2 Hill, 507); "Filly Horse" (Weir *v.* Hoss, 6 Ala. 881). Where B. had been accused of stealing a tray of biscuits, and A. said in the hearing of B. and of other persons, that if they did not look out he would make the tray of biscuits roar, held, that with proper averments connecting B. with this language of A., B. might maintain an action against A. (Briggs *v.* Byrd, 21 Ired. 353.) The words "I am a true subject, and thou servest no true subject," spoken to the servant of I. S., held sufficient to give a right of action to I. S. (Vin. Abr., Act. for Words, C. b. 1.) And so of the words, "Thy master, Mr. Browne, hath robbed me." (*Id.* 3.) If A. says to B., One of us two is perjured, and B. say to A., It is not I, and A. says again, It is not I, B. may maintain an action. (*Id.* 4; Coe *v.* Chambers, 1 Rolle Ab. 75.) For the words "Thy son hath robbed" me, the son of the person spoken to may maintain an action if he be the only son; and if one say to a son, thy father, or to a wife, thy husband

§ 133. The different effect which in certain cases is attributed to *written* as distinguished from *oral* language, does not extend to the construction of language with a

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hath robbed me, the father or the husband may have an action. (Vin. Abr. Act. for Words, C. B. 6; H. b; K. b; and see Ralph *v.* Davye, Sty. 150; Brent *v.* Ingram, Cro. Eliz. 36; Anderson *v.* Stewart, 8 Up. Can. Q. B. Rep. 243.) For the words "Your boys stole my corn," "your children are thieves," either of the sons in the one case, and of the children in the other, may sue. (Maybee *v.* Fisk, 42 Barb. 326; Gibney *v.* Blake, 11 Johns. 54; and see Henacre *v.* ———, Keb. 525.) And for the words, A. or B. killed T. S., either A. or B. may sue. (Falkner *v.* Cooper, Carth. 56.) And where several are included in the same libel, they may each maintain a separate action. (Smart *v.* Blanchard, 42 N. Hamp. 137; Ellis *v.* Kimball, 16 Pick. 132.) Where the language affects a particular class of men, as for instance men of the gown, it gives no right of action to an individual of that class. (Ryckman *v.* Delavan, 25 Wend. 186; rev'g White *v.* Delavan, 17 Wend. 49.) And see Ellis *v.* Kimball, 16 Pick. 132; Le Faun *v.* Malcolmson, 1 Ho. of Lords Cas. 637. Thus where Ensign Sumner brought an action against Buel for defamatory matter published by Buel, reflecting on the character of the officers generally of the regiment to which the plaintiff belonged, it was held by a majority of the court that the action could not be maintained, and that the appropriate remedy in such a case was indictment. (Sumner *v.* Buel, 12 Johns. 475.) An information may issue in such a case. See Rex. *v.* Baxter, 12 Mod. 139; L'd Raym. 879; Rex *v.* Osborne, 2 Barnard. 138; Kel. 230 Pl. 183; Rex *v.* Griffin, Rep. temp. Hardwicke, 39; Rex *v.* Horne, Cowper, 672; Holt on Libel, 249; Cooke on Defamation, 215. Where the defamatory matter is concerning a class, as an unincorporated fire company, the members of the class cannot maintain a joint action. (Giraud *v.* Beach, 3 E. D. Smith, 337.) A man may be libeled, not by name, or any specific description of himself, but under some such description of persons as includes him with others—as all the brewers in a designated portion of a city. (Ryckman *v.* Delavan, 25 Wend. 186; rev'g White *v.* Delavan, 17 Wend. 49; and see Le Faun *v.* Malcolmson, 1 Ho. of Lords Cas. 637.) And "a scandal published of three or four or any one or two of them is punishable at the complaint of one or more or all of them." (Holt on Libel, 247; Harrison *v.* Bevington, 8 C. & P. 807.) Thus where there was an indictment against sixteen persons for conspiracy, and I. S. said the defendants were those who helped to murder W. N., held, either of the sixteen defendants might have his action (Vin. Abr., Act. for Words, C. b. 5; and see Forbes *v.* Johnson, 11 B. Monr. 48; Chandler *v.* Holloway, 4 Port. 17; and see Parties, *post.*) And where the charge was against the deputy-lieutenants engaged in suppressing a riot, held one of such lieutenants might sue. (Morthland *v.* Cadell, 4 Paton, 385; Boyd Kinnears Dig. of H. C. Cas. 227.) But where the allegation was that a number of articles had been put into the market, and fraudulently sold as antiquities, held that a dealer in antiquities could not maintain an action. (Eastwood *v.* Holmes, 1 Fos. & F. 347.) Where the intention to apply defamatory remarks to the prosecutor is rendered doubtful and ambiguous by the defendant having left blanks for names, or from his having given merely the initials or introduced fictitious names, it is always a question for the opinion and judgment of the jury whether the prosecutor was the party really aimed at. (2 Starkie on Slander, 32; The State *v.* Jeandell, 32 Penn. State Rep. 475; Mix *v.* Woodward, 12 Conn. 262; Ryckman *v.* Delavan, 25 Wend. 186.) For this purpose the judgment and opinion of witnesses who, from

view to determine its proper meaning.[1] For the purpose of its construction, language is to be regarded not merely in reference to the words employed, but according to the sense or meaning which, all the circumstances of its publication considered, the language may be fairly presumed to have conveyed to those to whom it was published. The language is always to be regarded with reference to what has been its effect, actual or presumed, and the sense is to be arrived at with the help of the cause and occasion of its publication.[2] The court or the jury is to place

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their knowledge of the parties and the circumstances, are liable to form a conclusion as to the defendant's intention and application of the libel, is evidence for the information of the jury; (2 Starkie on Slander, 321), and he adds in a note; Lord Ellenborough held that the declarations of spectators while they looked at a libelous picture, publicly exhibited in an exhibition-room, was evidence to show that the figures portrayed were meant to represent the parties alleged to have been libeled. (Du Bost *v.* Beresford, 2 Camp. 512); and see Starkie on Evidence, part iv., p. 861. In New York a witness is not allowed to state his conclusion from the facts as to the intention of the defendant to apply the words or libel to the party or circumstances as alleged. (Van Vechten *v.* Hopkins, 5 Johns. 211; Gibson *v.* Williams, 4 Wend. 320.) In some other States witnesses have been allowed to testify as to the sense in which they understood the words, and the application of the words to the plaintiff. (Morgan *v.* Livingston, 2 Rich. 573; Miller *v.* Butler, 6 Cush. 71; Leonard *v.* Allen, 11 Cush. 241; McLaughlin *v.* Russell, 17 Ohio, 475; Goodrich *v.* Davis, 11 Met. 473; Goodrich *v.* Stone, 11 Met. 486; Allensworth *v.* Coleman, 5 Dana, 315; White *v.* Sayward, 33 Maine, 322; Mix *v.* Woodward, 12 Conn. 262; Smart *v.* Blanchard, 42 N. H. 137; Smaley *v.* Stark, 9 Ind. 386; Tompkins *v.* Wisener, 1 Sneed, 458; Commonwealth *v.* Buckingham, Thacher's Crim. Cas. 29.) But the rule adopted in New York appears to have been followed in Snell *v.* Snow, 13 Met. 278; Rangler *v.* Hummell, 37 Penn. St. Rep. 130; Briggs *v.* Byrd, 11 Ired. 353.

[1] In Edsall *v.* Brooks, 3 Robertson, 295, it is said: "Although greater liberality seems to be exercised in the case of words when they are spoken, than when they are contained in written or printed articles, yet in both cases it must be one of intent, of course a person must be presumed to have used words in their ordinary import among those who speak the language to which such words belong, in the community in which they are uttered or published, but if they have acquired by local usage a different meaning, it must be presumed that they were used to convey the ideas attached to them by such usage, and such meaning may be alleged as a fact in the pleadings, and the evidence upon it may be passed upon by the jury. The meaning of all words in the English language is not everywhere the same, and the only criterion of the meaning of them, as used on any occasion, is the understood meaning in the community, society or individuals to whom they were addressed; it is only when understood in that sense they do the party at whom they are aimed any injury."

[2] In actions for words we are to consider the words *themselves* and the *causa dicendi*,

itself in the situation of the hearer or reader, and determine the sense or meaning of the language in question according to its natural and popular construction.[1]

It is said that words to confer a cause of action for slander or libel ought to be in the affirmative,[2] and that actions for slander do not lie upon inferences,[3] but negative

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for sometimes in the first case they will bear an action, and yet when the *causa dicendi* is considered they will not. (Barclay, J., Mar. 20, p. 45.) "In case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking them; for *sensus verborum ex causâ dicendi accipiendus est.*" (4 Co. 18.) The construction which it behooves a court of justice to put on a publication which is alleged to be libelous, is to be derived as well from the expressions used, as from the whole scope and apparent object of the writer. (Van Buren, Senator, Spencer *v.* Southwick, 11 Johns. 592.)

[1] "Words are now construed by courts as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them." (Roberts *v.* Camden, 9 East, 93.) "It is quite clear, from all the modern authorities, that a court must read these words in the sense in which ordinary persons, or in which we ourselves, out of court, reading this paragraph, would understand them." (Tenterden, C. J., Harvey *v.* French, 1 Cr. & M. 11.) We cannot pervert the words and alter the ordinary construction of them. (Bonyon *v.* Trotter, Sty. 231.) The words must be understood by the court in the same sense in which the rest of mankind would ordinarily understand them. (Woolnoth *v.* Meadows, 5 East, 463; Spencer *v.* Southwick, 11 Johns. 579.) We "ought to expound words according to their general signification." (Pratt, C. J., Button *v.* Heyward, 8 Mod. 24), or acceptation (Fallenstein *v.* Boothe, 13 Mis. 427; Ogden *v.* Riley, 2 Green, 186); their popular sense (Duncan *v.* Brown, 15 B. Monr. 186; Hancock *v.* Stephens, 11 Humph. 507) their most obvious meaning (Hogg *v.* Wilson, 1 N. & M. 216), or common import (Thirman *v.* Mathews, 1 Stew. 384; Hogg *v.* Dorrah, 2 Port. 212), as understood by the hearer (Dorland *v.* Patterson, 23 Wend. 422; Butterfield *v.* Buffum, 9 N. Hamp. 156; McGowan *v.* Manifee, 7 Monr. 314); and according to the ideas they are calculated to convey (Demarest *v.* Haring, 6 Cow. 76; Truman *v.* Taylor, 4 Iowa, 424); according to their natural meaning and common acceptation (Wright *v.* Paige, 36 Barb. 438; s. c., on appeal, 3 Trans. App. 134.) The jury are to be guided in forming their opinion [on the meaning of the alleged defamatory matter] by the impression which the words or signs used were calculated to make on the minds of those who heard or saw them, as collected from the whole of the circumstances. (1 Starkie on Slander, 60.) Words are to be taken in that sense in which they are generally understood, and when that puts upon them a guilty sense they are actionable. (Pike *v.* Van Wormer, 6 How. Pr. R. 99; Dias *v.* Short, 16 *id.* 322; Walrath *v.* Nellis, 17 *id.* 72; Hughley *v.* Hughley, 2 Bailey, 592; Tuttle *v.* Bishop, 30 Conn. 80.) The words are to be taken in their natural meaning and according to common acceptation (Carroll *v.* White, 33 Barb. 618), and the vulgar intendment of the bystanders. (Somers *v.* House, Holt, 39.)

[2] Weblin *v.* Meyer, Yelv. 153.

[3] Jenk. 302 Pl. 72. To sustain an action plaintiff must show (1) that the words

or ironical language may be shown to be in fact affirmative, and if so found, has the like effect as affirmative words.[1] "The law cannot be evaded by any of the artful and disguised modes in which men attempt to conceal libellous or slanderous meanings;"[2] and the fact of language being

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used either "of themselves or by reference to circumstances, are capable of the offensive meaning attributed to them; (2) that the defendant did, in fact, use them in that sense." (1 Starkie on Slander, 44.) "Words imputing crime must be precise." (*Id.*) See note to § 142, *post.*

[1] Words calculated to induce the hearers to suspect that the plaintiff was guilty of the crime alleged, are actionable. (Drummond *v.* Leslie, 5 Blackf. 453.) It is not necessary that the words in terms should charge a crime. If such is the necessary inference, taking the words altogether, and in their popular meaning, they are actionable. (Morgan *v.* Livingston, 2 Rich. 573; Cass *v.* Anderson, 33 Verm. 182; Colman *v.* Godwin, 3 Doug. 90; 2 B. & C. 285; Commonwealth *v.* Runnels, 10 Mass. 518.) "A libel in hieroglyphics is as much a libel as an open invective. Not only an allegory but a rebus or an anagram may be a libel." (Holt on Libel, 245.) The man that is painted with a fool's cap or coat, or with horns, or whose picture is drawn with asses' ears, is certainly abused. (1 Wood's Inst. 445; Holt on Libel, 244; Du Bost *v.* Beresford, 2 Camp. 512; Mezzara's Case, 2 City Hall Recorder, 113.)

"I know what I am, and I know what Snell is; I never buggered a mare." These words held to import a charge of buggery against Snell. (Snell *v.* Webbling, 2 Lev. 150.) But the words, "I never came home and poxed my wife," held not capable of being construed as a charge that the party to whom the words were addressed had gone home and poxed his wife. (Clerk *v.* Dyer, 8 Mod. 290.) And so the words, "A man that would do that would steal," held not to amount to a charge of stealing. (Stees *v.* Kemble, 27 Penns. 112.)

The defendant wrote a pamphlet called "Advice to the Lord Keeper, by a Country Parson," wherein he would have him love the church as well as the Bishop of Salisbury, manage as well as Lord Havesham, be brave as another Lord, &c. The defendant was found guilty, and upon motion in arrest of judgment, it was urged that no ill thing was said of any person, and all he said was good of them; but by the court; the words were laid to be *ironical*, and the jury have found them to be so, and the motion was refused. (Reg. *v.* Browne, Holt, 435; 11 Mod. 86, recognized, Andrews *v.* Woodmansee, 15 Wend. 232; Boydell *v.* Jones, 4 M. & W., 446; 7 Dowl. Pr. Cas. 210.) So where the words were, "You are no thief." (4 Rep. 19; Cro. Jac. 65; 2 Bulst. 138; L'd Raym. 236.) You will not play the Jew nor the hypocrite. (Rex *v.* Brown, Popham, 139; Hob. 215.) "An honest lawyer." (Boydell *v.* Jones, 4 M. & W. 446; 7 Dowl., P. C. 210.) They being alleged to have been spoken ironically, and so found by the jury, held to be actionable.

[2] Shaw, Ch. J., Commonwealth *v.* Child, 13 Pick. 198. The court will regard the use of fictitious names and disguises in a libel in the sense that they are commonly understood. (The State *v.* Chace, Walk. 384.) "If, therefore, obscure and ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import; and the sense in which it was intended, is to be gathered from the context and from all the facts and

ungrammatical, or such as is not usually found in any dictionary,[1] will not suffice to prevent the law taking cognizance of such language, or of the meaning it properly conveys.[2]

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circumstances under which it was used." (Shaw, Ch. J., Commonwealth *v.* Kneeland, 20 Pick. 206; and see Vanderlip *v.* Rose, 23 Penn. State Rep. (11 Harris), 82.) "One half of the English language is interpreted by the context." Alderson, B. Dellevene *v.* Percer, 9 Dowl. P. C. 245.

A defamatory writing expressing only one or two letters of a name, in such a manner that from what goes before and follows after it, must necessarily be understood to signify a certain person in the plain, obvious, and natural construction of the whole, is to be understood as if the name were written in full. (Reg. *v.* Hurt, Hawk. Pl. Cr. 194; Rex *v.* Woodfall, Lofft, 776; Roach *v.* Read, 2 Atk. 469; Holt on Libel, 243.) If in a libel asterisks be put instead of the name of the party libeled, it is sufficient that the plaintiff should be so designated that those who know him may understand that he is the party meant. It is not necessary that all the world should understand that the plaintiff is the party intended. (Bourke *v.* Warren, 2 C. & P. 307); and see in note 2 *infra*, and note page 163, *ante*.

[1] One "cannot protect himself from an action by the mere grammatical structure of the phrase." (Cowen, J., Cornelius *v.* Van Slyck, 21 Wend. 70.) "The etymology of words, or the grammatical construction of sentences, will be fallacious if followed as the only guides in the interpretation of language." (Borthwick on Libel, 142.) "Here is three *cockels* in this place we *now* them well, he is a *nave*, he cheats and *rongs* the country, and is the cur of a son of a whore." The indictment for these words was demurred to because the words were not intelligible, but the court overruled the demurrer, and said "it would be hard that a court of justice must not understand what is *spelt* badly, when all the world besides makes no scruple to find the signification of the words." (Rex *v.* Edgar, 2 Sess. Cas. 29, Pl. 33.) "Common sense is not to be deemed a stranger to legal process, but as very influential in ascertaining the force and effect of words and sentences which, although technical, are to receive a sensible construction." (Parker, Ch. J., Commonwealth *v.* Runnels, 10 Mass. 518.)

[2] Courts take judicial notice of the meaning of words and idioms in the vernacular language. (1 Greenl. Ev. § 5, citing 6 Vin. Ab. 491, Pl. 6, 7, 8; Tit. Court C.; Hoyle *v.* Cornwallis, 1 Stra. 387; Page *v.* Faucet, Cro. El. 227; Harvey *v.* Brand. 2 Salk. 626; and see note 1, p. 171, *post*.) And no colloquium or innuendo is necessary to point their meaning. (Elam *v.* Badger, 23 Ill. 498; Forbes *v.* King, 1 Dowl. P. C. 672; Hoare *v.* Silverlock, 12 Adol. & Ell., N. S. 624; Homer *v.* Taunton, 5 Hurl. & Nor. 661; Fuck is an English word and no innuendo is necessary to point its meaning (Edgar *v.* McCutchen, 9 Missouri, 768.) In Hoare *v.* Silverlock (12 Ad. & El., N. S. 624), the court took judical notice, without an innuendo, of the reproachful meaning of the term "frozen snake," and so in Ashley *v.* Billington (Carth. 231), of the term "Jezebel," and so of the terms "Empirick" and "Mountebank." (Vin. Abr., Act. for Words, S. *a*. 12.) In King *v.* Lake (2 Ventr. 18), the court said they could not take notice of "milk your purse," because it had not become an idiom. See as to "Man Friday," "Gambling Fracas." (Forbes *v.* King, 1 Dowl. 672.) Shooting out of a leather gun. (Harman *v.* Delany, 2 Stra. 898.) "Bogus pedlar" was said not to have acquired a meaning sufficiently definite to allow the court to

§ 134. Whenever language charged to be defamatory has any reference to or is connected with any other language or event, which affects its meaning or effect, it must be construed in relation to such other language or event; and this, although on the face of the alleged defamatory matter there is no reference to any other language or event.[1] In the absence, however, of any allegation or proof to the contrary, matter which has on its face no reference to any other language or event, will not be presumed to have any such reference, and must be construed as standing alone.[2]

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take judicial notice of its import. (Pike *v.* Van Wormer, 6 How. Pr. R. 101; 5 *id.* 175.) The law does not take notice of what a "cozener" is (Walcot *v.* Hind, Hutt, 14); or the meaning of "tan money." (Day *v.* Robinson, 1 Ad. & El. 554.) Woolcomber held not to need an innuendo to show it means one who buys wool to work with. (Anon. Lofft, 322.) Truckmaster, a word said not to be found in any dictionary, was used without an innuendo; it was left to jury to decide if used in libelous sense. (Homer *v.* Taunton, 5 Hurl. & Nor. 661.) Doubted if the term "swindler" was one of which the court would take judicial notice (l'Anson *v.* Stewart, 1 T. R. 748); but see Forrest *v.* Hanson, 1 Cr. C. C. 63. The Court refused to take notice that "*hooked*" is sometimes used to mean "*stole*" (Hays *v.* Mitchell, 7 Blackf. 117); or "*goose-house*" to mean "*brothel*." (Dyer *v.* Morris, 4 Mis. 214.)

The court is to inform itself of the meaning of English words, although unusual and peculiar to a particular place (Parke, B., McGregor *v.* Gregory, 2 Dowl., N. S. 769; 11 M. & W. 287; Com. Dig., Act. for Defam. C.), as healer of felons (Rolle Abr. 86); or Welsh words (Hobart, 126), *Daffa-down-dilly*, by averment meaning *ambo dexter* (Pearce's Case, Cro. Car 382); and where particular English words have acquired some sense different from their natural one, an averment by way of inducement of that acquired sense is necessary; an innuendo without such an averment would be insufficient (McGregor *v.* Gregory, 2 Dowl. N. S. 769); so held of the terms *black sheep* and *black* legs (*id.*); and see notes 1, pages 171 and 175, *post*.

[1] Tighe *v.* Cooper, 7 Ell. & Bl. 639. The defendant has always been permitted, by way of defence, to show the matter affecting the meaning of the alleged defamatory matter, as in an action for calling plaintiff a murderer, it may be urged that the words were used in the course of a conversation about unlawful hunting and merely imported that plaintiff was a murderer of hares (4 Co. 14), so where the charge was maintenance defendant might show that lawful maintenance was intended (Cro. Jac. 90; Kinnersly *v.* Cooper, Cro. Eliz. 168; and see Brittridge's Case, 4 Co. 18.) And where defendant charged plaintiff with the commission of an offence, but alleged that plaintiff was insane at the time: *Held*, that although otherwise actionable yet as insanity would be an excuse for the offence the charge was not actionable (Abrams *v.* Smith, 8 Blackf. 95.)

[2] Explanatory circumstances known to both parties, speaker and hearer, are to be taken into the account as part of the words. (Dorland *v.* Patterson, 23 Wend. 422, citing Andrews *v.* Woodmansee, 15 *id.* 232; Miller *v.* Maxwell, 16 *id.* 9; Heming *v.*

It is impossible to anticipate or catalogue all the circumstances which may affect the meaning of language, but among them are the circumstances of time, place, and usage,[1] and some others to be presently mentioned.

Power, 10 M. & W. 569; and see Hankinson *v.* Bilby, 2 Car. and Kir. 440; 16 M. & W. 446; Perry *v.* Mann, 1 Rhode I. 263.) Words otherwise actionable explained at the time of publication by referring to a known and particular transaction are to be construed accordingly. (Dole *v.* Rensselaer, 3 Johns. Cas. 458; Aldrich *v.* Brown, 11 Wend. 596; Trabue *v.* Mays, 3 Dana, 138; Emery *v.* Miller, 1 Denio, 208; Thompson *v.* Bernard, 1 Camp. 48; Shecut *v.* McDowel, Const. Rep. 35; Christie *v.* Cowell, Peake, 4; Pegram *v.* Styron, 1 Bailey, 595.) Words which do not necessarily import anything injurious, may do so when taken in connection with other charges (Beardsley *v.* Tappan, 1 Blatch. C't. Co't Rep. 588), or according to the common understanding of them. (Cooper *v.* Perry, Dudley, 247.) The defendant may show the language related to some transaction (Ceeley *v.* Hoskins, Cro. Car. 509; Norton *v.* Ladd, 5 N. H. 203), or was uttered in connection with other words, which controlled its meaning. (Stevens *v.* Handley, Wright, 123; Williams *v.* Cowley, 18 Ala. 206; Hays *v.* Mitchell, 7 Blackf. 117; Harrison *v.* Findlay, 23 Ind. 265; Robinson *v.* Keyser, 2 Foster (N. H.), 323.

Where the language is *prima facie* actionable, the burden is on the defendant to show that they are not actionable. (2 Starkie on Slander, 85; Penfold *v.* Westcote, 2 N. R. 335; Christie *v.* Cowell, Peake's Cas. 4; Sel. N. P. 1250; Bissel *v.* Cornell, 24 Wend. 354; Watson *v.* Nicholas, 6 Hump. 174.)

[1] "Libel * * * has been variously construed at various times; being a mere legal reason, and therefore variable not only according to all the circumstances of the times, but according to the ability and information of the judges. In ignorant and despotic times it had not the same limits and precision as in the days of liberty and science." (Holt on Libel, 43.) "In judging of the meaning of language, our juries have been directed to attend to the criteria of the time, the place, when and where, and the person by and to whom the language has been employed." (Borthwick on Libel, 142.)

"Precedents in actions for words are not of equal authority as in other actions; *norma loquendi* is the rule for the interpretation of words, and this rule is different in one age from what it is in another. The words which an hundred years ago did not import a slanderous sense, may now, and *vice versa*." (Harrison *v.* Thornborough, 10 Mod. 196; cited Beardsley *v.* Dibblee, 1 Kerr, 246.) And it is the duty of courts to take notice of the mutations in language. (Vanada's Heirs *v.* Hopkins, 1 Marshall Ken. R. 287.) "The precedents in Croke's reports are beginning to be considered apocryphal." (Gibson, J., Bash *v.* Sommer, 20 Penn. St. R. 159.) "Many of those cases [in Cro. Jac. and Cro. Car.] could not be supported at the present day. I do not mean to cast any doubt upon the cases quoted from Bacon's Abridgement and Comyn's Digest." (Pollock, C. B., Tozer *v.* Mashford, 6 Ex. 539; and see Beardsley *v.* Dibblee, 1 Kerr, 260; Foster *v.* Small, 3 Whart. 143; Bloss *v.* Tobey, 2 Pick. 320.) Bridgeman, Ch. J., said he was not satisfied to go by precedents, because he held that to be scandalous now which was not twenty years ago. That it is use makes words have force, and words that are actionable now, hereafter may not be so. (Carth. 55.) "The opinions of later times have been in many instances different from those in former days in relation to words." (Holt, Ch. J., Baker *v.* Pierce, 6 Mod. 23.)

§ 135. In allowing extraneous circumstances to affect the construction of language, courts inquire whether or not the hearer or reader of the language knew such circumstances. If the hearer or reader was acquainted with those extraneous circumstances, the construction will be with reference to them, not because it is important how the hearer or reader understood the language, but because those circumstances form a proper element in determining the meaning to be attributed to the language in question. If the hearer or reader was not acquainted with those extraneous circumstances, then they will not be taken into consideration in determining the meaning of the language. The hearer or reader not being acquainted with those circumstances which affect the meaning of the language, its effect upon such hearer or reader is as if no such circumstances existed, and the language is to be construed without reference to such circumstances. The circumstance that the act charged is physically or legally impossible, does not always prevent the language being actionable. The alleged test in such a case is the knowledge possessed by those to whom the language is pub-

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In the time of Charles the Second of England, it was held actionable to call one a Papist or to say he went to Mass (Row *v.* Clargis, L'd Raym. 482; 2 Salk. 696; Walden *v.* Mitchell, 2 Vent. 265; Cutler *v.* Friend, 2 Show. 140); but held otherwise in the reign of King James. (Ireland *v.* Smith, 2 Brown, 166.) So in England, to write of one that he was a "*Man Friday*," was held not actionable (Forbes *v.* King, 1 Dowl. P. C. 672; 1 Cr. & M. 435; 2 Law Jour. Rep. N. S. Ex. 109), for the reason as stated in Hoare *v.* Silverlock, 12 Adol. & El. N. S. 624, that being a black man might be a great misfortune, but was no crime; while in the United States it has been held actionable to call one a mulatto. (King *v.* Wood, 1 N. & M (So. Car.) 184; Eden *v.* Legare, 1 Bay, 171; Atkinson *v.* Hartley, 1 McCord, 203; contra Barrett *v.* Jarvis, 1 Hamm. 83, note; see Borthwick on Libel, 176; Trench's English Past and Present; Mills' Logic, Bk. iv. ch. v.—The history of variations in the meaning of terms.)

The word "*screwed*," or "*strained*," does not of itself import sexual intercourse, but in certain localities it may have that import. (Coles *v.* Haviland, Cro. Eliz. 250; Miles *v.* Van Horn, 17 Ind. 245; Rodeburgh *v.* Hollingsworth, 6 Ind. 339; Vin. Abr. Act. for Words, L. *b.* 7.) In London, England, *pimp* signifies *common bawd*. (Dimmock *v.* Fawset, Cro. Car. 393, pl. 5.) *Healer of felons* means, in some localities, *aider of felons; limir* means *thief*, and *outputter* means *receiver of felons* (Vin. Abr. Act. for Words, L. *b.* 1, 6), and see *id.* 4, 7, as to the word *champertor* and the phrase *cut him out of doors;* and see note 2, page 169, *ante.*

lished. Thus where the defendant attributed to the plaintiff sexual intercourse with a dog, and of having given birth to a litter of pups in consequence of such intercourse, it was held not to be a defence—that such a result was impossible. But *semble* that it might have been a defence if it had been shown that the defendant and those who heard the words knew that such a result was impossible.[1]

To charge A. with the murder of B., although B. was

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[1] Kennedy *v.* Gifford, 19 Wend. 296. Courts cannot say judicially whether it be possible for a woman to have connection with a dog, or to have pups by him, but as it is not popularly believed to be impossible, the people not being presumed to know scientific facts, the injury to the plaintiff will be the same in either case, and the action will lie. (Ausman *v.* Veal, 10 Ind. 355; Cleaveland *v.* Detweiler, 18 Iowa, 299.)

In Fenn *v.* Dixe, Jo. 444, pl. 5, the words were of a brewer and his beer. "I will give my mare a peck of malt, and lead her to the water and let her drink, and she shall piss as good beer as any Tom Fenn (the plaintiff) brews." One reason assigned for holding the words not to be actionable, was that the words were impossible to be true in the understanding of any man.

"Thou art a bastard-bearing whore, and hadst two bastards." It was objected that these words spoken of a married woman were not actionable, because a married woman cannot have a bastard, but held actionable because they purported that she was not married when she had the bastards. (Stevens *v.* Ask, Sty. 424.)

These words concerning a churchwarden, "Who stole the bell ropes, you scamping rascal?" Not actionable, because the property of the bell ropes was in the plaintiff as churchwarden, and as he could not steal his own property, the words imputed no felony. (Jackson *v.* Adams, 2 Bing. N. C. 402; 2 Scott, 599.) "If a man says to a miller who keeps a corn mill, thou hast stolen three pecks of meal, an action lies; for, although the corn was delivered to him to grind, nevertheless, if he steal it, it is felony, being taken from the rest." (1 Rolle's Abr. 73, s. 16, cited Nichols *v.* The People, 17 N. Y. 117; and see Hume *v.* Arrasmith, 1 Bibb, 165, and § 169, *post.*)

In an action for slander the words were, "You are a thief; you robbed Mr. L. of £30." The words were spoken in the hearing of B. and of several strangers. B. knew that the words did not mean to impute felony, but meant to impute that the plaintiff had improperly obtained £30 from Mr. L. to compromise an action for a distress: *Held*, that under these circumstances the question to be left to the jury *was not what the defendant meant by the words he spoke, but what reasonable men, hearing the words, would understand by them. Semble*, also, that if *all* the persons present when the words were spoken had known that the words did not impute felony, that would have been an answer to the action. (Hankinson *v.* Bilby, 2 Car. & Kir. 440; 16 M. & W. 442.) The mere fact that the defendant charged the plaintiff with theft, in regard to an article of property which had been either loaned or sold to the plaintiff, but which sale or loan was not known to those in whose presence he made the charge, will not be a ground of showing either that the act charged was impossible or that the charge was not seriously made. (Smith *v.* Miles, 15 Verm. 245.)

alive at the time, would be actionable; but *semble* not so if those to whom the publication was made knew that B. was alive.[1] So, *semble*, one tenant in common of chattels cannot be guilty of larceny of the chattels held in common; and therefore to charge one of several tenants in common with larceny of a chattel held in common, would be actionable, unless those to whom the publication was made knew of the tenancy in common.[2] For "if, at the time the words are uttered, there are circumstances [known to the hearers] which clearly show the words are not used in the sense of imputing a felony, then the charge falls to the ground and no action will lie."[3] "Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to might form a different judgment on the subject."[4]

§ 136. In the case of all oral, and of some written publications, it may be possible to prove whether or not the hearer or reader was acquainted with such extraneous

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[1] So held, Sergart *v.* Carter, 1 Dev. & Bat. 8; Snag *v.* Gee, 4 Coke, 16. "You have killed A.; you have poisoned him," are slanderous words, though, at the time they were spoken, A. was living in a distant part of the country. (Eckhart *v.* Wilson, 10 S. & R. 44; and see Tenney *v.* Clement, 10 N. H. 52; Carter *v.* Andrews, 16 Pick. 1; Stone *v.* Clark, 21 Pick. 51; Stallings *v.* Newman, 26 Ala. 300.) Wilt thou murder my sister as thou didst thy wife, actionable although the wife was alive. (Brown *v.* Charlton, Keb. 359, pl. 52.) Thy father says thou hast murdered thy husband. Judgment was arrested after verdict for plaintiff for these words, because it was not alleged that the husband was dead at the time the words were spoken. (Boldroe *v.* Porter, Yelv. 20.) Words actionable *per se* are not so when spoken of a transaction not amounting to the crime charged if known to the hearers to be so spoken. (Parmer *v.* Anderson, 33 Ala. 78; Hankinson *v.* Bilby, 2 Car. & K. 440; Carmichael *v.* Schiel, 21 Ind. 66; Perry *v.* Man, 1 Rhode Island, 263; Kennedy *v.* Gifford, 19 Wend. 296; Williams *v.* Stott, 1 Cr. & M. 675; 3 Tyrw. 688; Brite *v.* Gill, 2 Monr. 65; and see *post*, note to § 160.

[2] Carter *v.* Andrews, 16 Pick. 1; Stone *v.* Clarke, 21 Pick. 51; and see note 1, page 173, *ante*.

[3] Parke, B. Heming *v.* Power, 10 M. & W. 569.

[4] Hankinson *v.* Bilby, 16 M. & W. 445; and see note to § 140, *post*.

circumstances, but in the majority of cases it would be impossible to make such proof. Some circumstances are of such general notoriety that every person is presumed to be acquainted with them, and then all language must be construed in reference to them.[1] With circumstances of less general notoriety the knowledge of the hearer or reader is in every case a question of proof, and the burden of making such proof rests upon him who claims that the hearer or reader possessed such knowledge.

§ 137. The construction to be put upon any language spoken or written must be that which is consistent with the whole of the speech or writing. Thus the language of any part of a writing is to be construed with reference to the entire writing, and the language of any part of an oral discourse is to be construed with reference to the entire discourse. Hence words which, standing alone, would be actionable, may not be actionable when taken in connection with their context.[2]

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[1] "It is the duty of the jury to construe plain words and clear allusions to matters of universal notoriety, according to their obvious meaning and as everybody else who reads must understand them. But the defendant may give evidence to show they were used on the occasion in question in a different or qualified sense. If no such evidence is given, the natural interpretation of the words and the obvious meaning to every man's understanding must prevail. (Lord Mansfield, Rex *v.* Horne, 2 Cowper, 672.)

"You are a soldier; I saw you in your red coat doing your duty; your word is not to be taken." These words, spoken of an upholsterer, held actionable, it being known to be a common practice for tradesmen to protect themselves from arrest by their creditors by a counterfeit listing. (Arne *v.* Johnson, 10 Mod. 111.)

In an action for *libel* for writing to a client of the plaintiff, a barrister, "He would give her ill counsel and stir up a suit; he would *milk her purse* and fill his own large pockets," per Vaughan, C. J., "Saying he will milk your purse, taken annunciatively, signifies no more than milking a bull; the phrase is not come to an idiom." (King *v.* Lake, 2 Ventr. 18.) Mr. Parry, in his edition of Lord Campbell's Libel Act, says (p. 13) it is doubtful if this decision could now be supported, and we agree with him. See note 2, page 169, *ante*.

[2] The sense is to be gathered from the whole of the words or writing. (2 Starkie on Slander, 85; Cooke *v.* Hughes, 1 R. & M. 112; Carter *v.* Andrews, 16 Pick. 1; Cook *v.* Tribune Association, 5 Bl. C. C. 352.) The construction which it behooves a court of justice to put on a publication is to be derived as well from the expressions used as from the whole scope and apparent object of the writer. (Cooper *v.* Greely,

§ 138. Formerly the condition in life of the person spoken of materially affected the construction, and words concerning "great men of the realm" were held actionable, which would not have been so held when published concerning private persons. Language defaming these "great men" was called *scandalum magnatum*. In the United States no such distinction of persons is known.[1] How far the condition in life of the parties will affect the damages will hereafter be considered. [§§ 391, 417.]

§ 139. The sense in which the publisher meant the language cannot be material. The dicta which apparently sanction such a rule will, on a comparison with their context, be found in reality to be, not what did the defendant mean, but what properly may he be taken to have meant. How might the language be understood by those to whom it was published. It cannot, therefore, be correct to say that the language is to be construed in the sense in which the publisher intended it to be understood. "When a party has made a charge that clearly imputes a crime, he cannot afterwards be permitted to say, I did not intend what my words legally imply."[2]

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1 Denio, 358; citing Spencer *v.* Southwick, 11 Johns. 592; Fidler *v.* Delavan, 20 Wend. 57.) "God forbid that a man's words should, by strict and grammatical construction, be taken *by parcels*, against the manifest intent of the party upon consideration of all the words which import the true cause and occasion which manifest the true sense of them." (4 Co. 18.)

A defendant should be tried by all that he has published in the same pamphlet or paper. (Morehead *v.* Jones, 2 B. Munroe, 210.) Brittridge brought an action for the words, "Mr. Brittridge is a perjured old knave, *and* that is to be proved by a stake parting the lands of Martin and Wright." The judgment was arrested, on the ground that the latter words explained the former as not meaning judicial perjury. (4 Co. 18; Yelv. 10, 34; Mo. 666.)

[1] For information as to *scandalum magnatum*, the reader is referred to Starkie on Slander; Holt on Libel. *Secundem gradum dignitatis*, &c., was the rule of the Roman law, and is the rule in Scotland and France. (Borthwick on Libel, 176, 177 n., Inst. Lib. IV, tit. 4; Code Criminel, tit. 111, art. 1; Black. Com. B'k III, c. vii, s. 5; Selwy's N. P. 1155; Barrington on Penal Statutes; 3 Reeve's Hist. of the Common Law.) See note to § 182.

[2] Woodworth, J., McKinly *v.* Rob, 20 Johns. 351. Words having naturally none of their own, carry that signification to the hearer that he is used to put upon them,

§ 140. Where the language is *ambiguous*, in that case the manner in which it was or might be understood by those to whom it was published is material, and will control in determining the meaning; but where the language is *unambiguous*, it is to be construed in its ordinary sense, and without reference to how those to whom it was published understood it, or what was intended by the publisher.[1]

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whatever be the sense of him that uses them. (Locke, Conduct of the Understanding, § 35.)

The question in an action for words is not what the party using them considered their meaning by any secret reservation in his own mind, but what he meant to have understood as their meaning by the party to whom he uttered them. (Read *v.* Ambridge, 6 C. & P. 308.)

"The effect of the words used, and not the meaning of the party in uttering them, is the test of their being actionable or not." That is, first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them. (Hankinson *v.* Bilby, 16 M. & W. 442.) "The secret intent of the publisher is immaterial." (*Id.*) The injury caused by slander depends on the effect of the words on the hearers. (Hawks *v.* Patton, 18 Geo. 52.)

The speaker "is accountable for the import of the words as they will naturally be understood by the hearer." (Dorland *v.* Patterson, 23 Wend. 424; citing Harrison v. Thornborough, 10 Mod. 196; Gidney *v.* Blake, 11 Johns. 54.) "It was not enough that the defendant could point the slander in his own mind, so long as it appears to have been pointless in the minds of the hearers." (*Id.*) It is the sense in which the hearers understood the words on which the jury are to pronounce. (Demarest *v.* Haring, 6 Cow. 76; Kennedy *v.* Gifford, 19 Wend. 296.) "Language shall be construed and understood in the sense in which the writer or speaker intended it." (Commonwealth *v.* Kneeland, 20 Pick. 206.) If the words impute a crime, it is not necessary to allege an *intention* to charge such crime. (Galloway *v.* Courtney, 10 Rich. Law, 414.)

"Nor by the term *meaning* are we to understand what the defendant intended to express; for he may have designedly written that which, in its literal sense, should be imperfect. But we are to understand the meaning which he intended others should believe him to have—the sense in which he designed his production should be received by others. (George on Libel, 36.)

[1] A man is to some extent responsible for the hearing of the bystanders, if he uses language which imputes crime, with an explanation; if the bystanders did not hear the explanation, he is liable to an action. (Maybee *v.* Fisk, 42 Barb. 336; see, however, apparently *contra*, Shecut *v.* M'Dowell, 3 Brevard, 38.) But the understanding of the bystanders cannot be shown to make words actionable *per se*, which, as alleged in the declaration, are not actionable *per se*. (Smith *v.* Gafford, 33 Ala. 168.) Where the charge was actionable *per se*, and unambiguous, and there were no circumstances to qualify them, it was held error to charge the jury that unless the words were understood by the hearers in a slanderous sense they must find for the defendant. (Jarnigan *v.* Fleming, 43 Missi. 711.)

§ 141. The construction of language as actionable or not actionable, is sometimes determined by the knowledge or imputed knowledge of the person spoken of; thus the words "that thief A. hath stolen my goods and delivered them to Bacon," held not to give any right of action to Bacon, it not being alleged he knew the goods were stolen.[1] So of the words, he received goods that were stolen and will be hanged for them.[2] You have passed counterfeit money.[3] So to allege that one got his sister with child, or had carnal intercourse with his daughter, does not impute

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"Taken by itself, and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained. If words are uttered or printed, the ordinary sense of those words is to be taken to be the meaning of the speaker." (Daines *v.* Hartley, 3 Ex. 200.) "There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered is uttered in an ironical sense, and therefore that it may mean directly the reverse of what it professes to mean. Something may have previously passed which gives a peculiar character and meaning to some expression; and some word which ordinarily is used in one sense may, from something that has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean." (*Id.*)

"We are to understand words in the same sense as the hearers understood them." (Button *v.* Heyward, 8 Mod. 24.) "In a common sense, according to the vulgar intendment of the bystanders." (Somers *v.* House, Holt, 39; *ante*, § 135; Hankinson *v.* Bilby, 16 M. & W. 442.) Language imputing an indictable offense is actionable or not, according to the sense in which *it may fairly be understood* by those who hear or read it, and who are *not* acquainted with the matter to which they relate, or which may render them a privileged communication. (*Id.*) To accept the understanding of the words by the hearer or reader as their true meaning "would be to make the defendant's liability depend, not on his own malicious intent and purpose, in using the language, which might be quite innocent and free from blame, but upon the misconception or morbid imagination of the person in whose hearing they were spoken." (Heard on Libel, § 268, citing Snell *v.* Snow, 13 Metc. 278; Van Vechten *v.* Hopkins, 5 Johns. 211; Gibson *v.* Williams, 4 Wend. 320; Allensworth *v.* Coleman, 5 Dana, 315.) The judgment of the witness is not to be substituted for the judgment of the jury. (Heard on Libel, § 269.) "Words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them. (*Id.*, § 163.)

[1] Bacon's case, Dal. 41, pl. 21.

[2] Ratcliff *v.* Long, Palm. 67; in Miller *v.* Miller, 8 Johns. 74: *Held*, that where the offense charged was concealing stolen goods, it was not necessary to allege that the plaintiff knew the goods were stolen. See notes to § 173, *post.*

[3] Pike *v.* Van Wormer, 6 How. Pr. R. 171; Church *v.* Bridgman, 6 Miss. 190.

incest without an allegation that the plaintiff was guilty of the act charged with a knowledge of the relationship.[1] Without an allegation of knowledge, it was held not actionable to charge, "He hath gotten much wealth by trading with pirates,"[3] or, "He was confederate with Campion the Jesuit,"[2] or, "He poisoned Smith,"[4] or, "He is a maintainer of thieves,"[5] or, "He offered, or was about to offer for sale unwholesome meal."[6]

§ 142. It is customary to concede (1) that *formerly* courts construed language in *mitiori sensu*, and (2) that the practice of so construing language has been abandoned.[7] These propositions require some qualification.

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[1] Lumpkins *v.* Justice, 1 Smith (Ind.) 322; Griggs *v.* Vickroy, 12 Ind. 549.

[2] Crook *v.* Averin, Godb. 252; 2 Bulst. 216.

[3] Brown *v.* Lisle, Cro. Eliz. 251.

[4] Jacob *v.* Miles, Vin. Abr., Act. for Words, E. *b.*; and see March *v.* Davidson, 9 Paige, 580, and *post*, § 144, subd. x.

[5] Ball *v.* Bridges, Cro. Eliz. 746; and see Tabbe *v.* Matthew, 1 Bulst. 109.

[6] Hemmenway *v.* Woods, 1 Pick. 524. See note 1, page 174, *ante*.

[7] Where words are ambiguous, so as they may be expounded in good or ill part, no action lies, for they shall be expounded in the best sense. (Anon., Cro. Eliz. 672.) "The law strains not to hurt but to heal." (Coote *v.* Gilbert, Hob. 77 Pl. 100); and "where words are indifferent, and are equally liable to two distinct interpretations, we ought to construe them in *mitiori sensu*, but we will never make any exposition against the plain, natural import of the words." (Pratt, C. J., Button *v.* Heyward, 8 Mod. 24; and see Naber *v.* Miecock, Skin. 183.) Words are not to be taken in a milder sense than they have in common acceptation. (Beers *v.* Strong, Kirby, 12.) The maxim for expounding words in *mitiori sensu* has for a great while been exploded. (Fortescue, J., Button *v.* Heywood, 8 Mod. 24; Roberts *v.* Camden, 9 East, 93; and see Wakley *v.* Healey, 7 Com. B. 591; Ogden *v.* Riley, 2 Green, 186; Duncan *v.* Brown, 15 B. Monr. 186; Fallenstein *v.* Boothe, 13 Mo. R. 427; Demarest *v.* Haring, 6 Cow. 76; Pike *v.* Van Wormer, 6 How. Pr. R. 99; Backus *v.* Richardson, 5 Johns. 476.) "The earlier English judges discouraged the action of slander by all sorts of evasions." (Gibson, J., Bash *v.* Sommer, 20 Penn. St. R. 159; and see Harrison *v.* Thornborough, 10 Mod. 196.) "We will not give more favor unto actions on the case for words than of necessity we ought to do, where the words are not apparently scandalous, these actions being now too frequent." (Coke, C. J., Crofts *v.* Brown, 3 Bulst. 167.) In Alsop *v.* Alsop (5 Hurl. & N. 534), the court says actions for slander are not to be encouraged; and see Bennett *v.* Williamson, 4 Sandf. 67, where it is said: "The law of libel ought to be considered and is in its spirit a benevolent and salutary provision for the peace and security of the community, but it cannot redress every injury sustained by a breach of morals or of good manners. We may not approve of

Alleged defamatory matter comes before the court for construction in the form of a pleading, and then of course is governed by the rules for construing pleadings, and among these rules that by which the pleader is supposed to have stated his case in the manner most favorable to himself.[1] We are of the opinion that an examination of

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the taste of publications such as is set forth in the declaration in this case. We may lament the existence of a disposition to make private character too much the subject of comment and abuse without having it in our power through the instrumentality of the law to arrest the evil;" and in Dollaway *v.* Turrell, 26 Wend. 397, the action for libel is designated as a sordid action. "Although slanders are to be suppressed, yet the judges had resolved that actions for scandals should not be maintained by any strained construction." (Wray, C. J., Stanhope *v.* Blith, 4 Co. 15.) Ch. J. Holt said that, whenever words tended to take away a man's reputation, he would encourage actions for them, because so doing would contribute to the preservation of the peace; and he repeated a story attributed to Justice Twisden, of a man who, failing in his action for words, said, if he thought he should not have recovered damages he would have cut the defendant's throat. (Baker *v.* Pearce, L'd Raym. 959; 6 Mod. 24; Cas. temp. Holt, 654; and see *ante*, note p. 97.) One who couches his slander in ambiguous terms, in the hope of blasting the reputation of his neighbor, without incurring any legal responsibility, cannot claim an indulgent construction of his words. (Gibson *v.* Wiliams, 4 Wend. 320.)

Starkie (1 Starkie on Libel, 47) refers to the following cases as specimens of the doctrine of *benignior sensus:* "Thou art as arrant a thief as any in England, for thou broken up J. S.'s chest, and taken away £40." After verdict for plaintiff held not actionable. (Forster *v.* Browning, Cro. Jac. 687.) "Thou art a lewd fellow; thou didst set upon me by the highway, and take my purse from me, and I will be sworn to it." After judgment for the plaintiff, held on error not actionable. (Holland *v.* Stoner, Cro. Jac. 315.) "Thou art a thievish rogue, and hast stolen bars of iron out of other men's windows;" held not actionable. (Cro. Jac. 204.) "J. D. was robbed of £40, and Alice Bagg (the plaintiff) and J. S. had it, and for which they will be hanged;" after judgment for plaintiff, held not actionable. (King *v.* Bagg, Cro. Jac. 331.) And so of "Thou dost lead a life in manner of a rogue; I doubt not but to see thee hanged for striking Mr. Sydman's man, who was murdered." (Barrons *v.* Ball, Cro. Jac. 331.)

[1] The law will not assume in favor of a party any thing he has not averred (Cruger *v.* Hudson River R. R. Co., 12 N. Y. 201), or that the pleading is less strong than the facts warrant (*id.*). A pleading is to be construed in its popular sense (Woodbury *v.* Sackrider, 2 Abb. Pr. R. 405; Munn *v.* Morewood, 5 Sandf. 557); according to what it says, and not what the pleader intended. (Gould *v.* Glass, 19 Barb. 185; and see Allen *v.* Patterson, 7 N. Y. 480; Sheddon *v.* Patrick, 1 Macq. H. L. Cas. 535.) The court will not, in support of a pleading, infer a criminal intention where the pleader has not ventured directly to aver its existence. (Bartholomew *v.* Bentley, 15 Ohio, 670.) "It is a clear principle that the language of an indictment [a pleading] must be construed by the rules of pleading, and not by the common interpretation on ordinary language, for nothing indeed differs more widely in construction than the same matter when viewed by the rules of pleading and when construed by the language of

the decisions will disclose the fact that what are regarded as constructions in *mitiori sensu* are usually a more or less rigorous application of this rule of pleading. The words admitting of two constructions, the one actionable and the other not actionable, where the pleader failed to point the language to the actionable meaning, courts have refused to put the actionable meaning on the language, supposing that if the language had such a meaning the pleader would have pointed it out. The rule requiring certainty in the allegations of a pleading was no doubt carried to excess,[1] but we take it to have always been and to be still the rule, that where a party makes a charge of having been injured by language it is for him to show that the words have a defamatory sense,[2] and that where the language is equally as susceptible of a harmless as of an injurious meaning, it is the duty of the pleader and not of the court to point out the injurious meaning, and if he fails to do this the court will not put upon the language the injurious meaning. Although there may be no rule by which courts are required to put on ambiguous lan-

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ordinary life." (Per Erle, J., in Reg. *v.* Thompson, 16 Q. B. 832, 846; 4 Eng. Law & Eq. R. 287, 292; and see Blickenstaff *v.* Perrin, 27 Ind. 527; Lukehart *v.* Byerley, 53 Penns. 418.)

[1] Action for the words *Home dit:* Sir Th. Holt hath taken a cleaver and stricken his cook upon the head, so that one side of the head fell upon one shoulder and the other upon the other shoulder, et [the declaration] ne averr que le cook fuit mort, et pur ceo fuit adjudge nemy bon. (Rolle R. 286.)

[2] Tindal, Ch. J., Edsall *v.* Russell, 5 Scott's N. R. 801; 2 Dowl. N. S. 614; 4 M. & G. 1090; 12 Law Jour. Rep. N. S. C. P. 4; note 3, p. 167, *ante.* "Either the words themselves must be such as can only be understood in a criminal sense, or it must be shown in a colloquium in the introductory part that they have that meaning, otherwise they are not actionable." (Holt *v.* Scholefield, 6 T. R. 691.) Words to be actionable should be unequivocally so. (Harrison *v.* Stratton, 4 Esp. Cas. 218.) Where there is no *colloquium,* the plaintiff must be held to allege that the words were used in their natural and ordinary signification (Edgerly *v.* Swain, 32 N. Hamp. 478); and they will be so construed, and not in *mitiori sensu.* (Chaddock *v.* Briggs, 13 Mass. 248; Bloss *v.* Tobey, 2 Pick. 320.) Where the words have two meanings, one of them harmless, and the other injurious, the innuendo may properly point out the injurious meaning. (Joralemon *v.* Pomeroy, 2 N. Jersey, 271; Griffith *v.* Lewis, 8 Q. B. 841; 7 Law Times, 177; Gosling *v.* Morgan, 32 Penns. 273.)

guage its non-actionable sense, certainly there is no rule by which courts are required to put on ambiguous language the actionable sense. The rule is that the natural meaning is to be taken,[1] and if in that view the language will bear a non-actionable meaning equally as well as an actionable one, courts will adopt the non-actionable construction. Where the meaning is doubtful, the pleader may by an innuendo point the language to the sense in which he wishes it to be understood. Where the alleged defamatory matter was that A., a prostitute, was under the patronage or protection of the plaintiff, but there was no innuendo pointing an injurious meaning, the language was held not actionable. The court held, in effect, that it would not give language the injurious sense when the words may as properly receive a harmless as an offensive construction.[2] "Where words in their ordinary sense do not bear a defamatory construction there must be a distinct averment that the words bear a meaning that is actionable."[3] Courts will not strain to find an innocent

[1] Words "are not to be taken in the more lenient or the more severe sense, but in the sense which fairly belongs to them, and which they were intended to convey." (L'd Ellenborough, Rex *v.* Lambert, 2 Camp. N. P. Cas. 398.) See note 1, p. 167, *ante*. The court will not in support of a pleading infer a criminal intention, when the pleader has not ventured directly to aver its existence. (Bartholomew *v.* Bentley, 15 Ohio, 670.)

[2] More *v.* Bennett, 33 How. Pr. R. 180; 48 Barb. 229; and see Dolloway *v.* Turrell, 26 Wend. 383; the court in the absence of an innuendo construed in a harmless sense a charge of using money for shaving purposes. (Stone *v.* Cooper, 2 Denio, 292.) In Edsall *v.* Russell (5 Scott, N. R. 801; 2 Dowl. N. S. 614; 4 Man. & G. 1090), the words were, "He made up the medicines wrong through jealousy, because I would not allow him to use his own judgment." There being no innuendo that the defendant meant to impute that the medicines occasioned any injury, the court refused to put that meaning upon them, and held the words not actionable. And see Forbes *v.* King, 1 Dowl. 672; Kelly *v.* Partington, 5 B. & Adol. 645. The head note to Wesley *v.* Bennett (5 Abb. Pr. R. 498); that "where the words alleged in a complaint for libel are fairly susceptible of a construction which would render them actionable, the complaint will be sustained upon demurrer, although the words may also be interpreted in a way which would render them innocent," although it may be a correct statement of the law, seems not to be justified by the opinion of the court. The decision was that the alleged libel might "fairly be held to mean" that plaintiff was engaged in the conspiracy mentioned in the charge.

[3] Blackburn, J., Cox *v.* Cooper, 9 Law Times, N. S. 329.

meaning, nor will the court put a forced construction on words having an innocent meaning. The words, he was guilty of most abominable conversation and exposure of his person held not actionable *per se*.[1] Where the allegation was that defendant, speaking of certain spoons belonging to her, said, "I dare say she [the plaintiff] has some of them in her pocket." There being no innuendo, held not actionable as plaintiff might have the spoons in her pocket innocently.[2] Publishing of plaintiff that he figured prominently in the squatter riots not explained by innuendo, held not actionable as it did not follow plaintiff was wrongly or unlawfully engaged in said riots.[3] Where the words were of persons in trade, "look out sharp to get your bills met by them," the court held that *prima facie* the words were harmless.[4] And the word "blackleg" unexplained was held not actionable.[5] So, there being no proper colloquium to point the meaning of the words "he was taken to court on a charge of forgery" were held not actionable as they might mean plaintiff was taken to court as a witness.[6] Among other reasons which might be urged for requiring the plaintiff to allege in what sense he considers and desires the court and jury to consider the language was used is this, that unless he does so he deprives the defendant of the right to traverse the sense which the plaintiff imputes to the language of which he complains. An instance of the advantage to a defendant of this right is the case where the plaintiff alleged that defendant had applied to him the term "black sheep," and that the defendant was accustomed to use that term to mean a person of bad reputation, and that the term was so used

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[1] Torbett *v.* Clare, 9 Irish Law Rep. 89; Ward *v.* Reynolds, 1 Dav. & Mer. 507.

[2] Martinere *v.* Mackay, 2 Law Reporter, 120 (London, 1822).

[3] Clarke *v.* Fitch, to be reported, 40 or 41 Cal.

[4] Daines *v.* Hartley, 3 Ex. 200.

[5] Barnett *v.* Allen, 1 Fos. & F. 125; 3 Hurl. & N. 376.

[6] Harrison *v.* King, 7 Taunt. 431; affirming 4 Price, 46.

on the occasion of which the plaintiff complained. The defendant pleaded that he had not so used the term on the occasion in question, and upon demurrer the plea was sustained.[1]

§ 143. Where language may be taken in a double sense, the court, after a verdict, will *usually* construe it in that sense which will support the verdict.[2] If the lan-

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[1] McGregor *v.* Gregory, 11 M. & W. 287; affirming Clarkson *v.* Lawson, 6 Bing. 587.

[2] In Burgess *v.* Boucher, 8 Mod. 240, it is said that after verdict the court will *always* construe the words to support the verdict, and the dictum is repeated by Starkie without qualification. (2 Starkie on Slander, 108.) But such a rule as was pointed out by Best, C. J., in Goldstein *v.* Foss (6 B. & Cr. 154; 9 D. & R. 197; 4 Bing. 489; Moo. & P. 402; 2 Y. & Jer. 146), would practically deprive a party of the right to move in arrest of judgment; and see Forbes *v.* King, 1 Dowl. Pr. Cas. 672. In Ceely *v.* Hoskins (Cro. Car. 509), the words were, "Thou art forsworn in a court of record, and that I will prove." It was contended after verdict for plaintiff that the action would not lie, because it was not said in what court of record he was forsworn, nor that he was forsworn in giving any evidence to a jury; that it might be intended only that he was forsworn, not judicially, but in ordinary discourse in some court of record: *Held,* the words must be taken as an accusation of perjury; the court adds; to say such an one is a murderer without saying whom he murdered, or when, an action lies, and it shall not be intended that he was a murtherer of hares, unless such foreign intendment be shown or discovered in pleading. In Baal *v.* Baggerly (Cro. Car. 326), the words were, "Thou hast forged a privy seal and a commission! why dost thou not break open thy commission?" after verdict for plaintiff it was contended that the words were not actionable, but by the court being found guilty, the words are to be intended according to the vulgar interpretation, that the king's privy seal was meant, the counterfeiting whereof is treason. In Somers *v.* House (Holt, 39), the words were, "You are a rogue, and broke open a house at Oxford; and your grandfather was forced to bring over £30 to mend the breach;" after verdict for plaintiff, it was urged in arrest of judgment that the word rogue was not actionable, that *breaking open* a house was but a trespass, and *mending the breach* might be *repairing;* but the court held the contrary, for, taking all the words together, one who heard them could not but understand a felonious breaking; the court would take the words in a common sense according to the vulgar intendment of the bystanders. In Baker *v.* Pierce (L'd Raym. 959; 6 Mod. 234; Holt, 654), the words were, "Baker stole my boxwood, and I will prove it." After verdict for plaintiff, it was urged in arrest of judgment, that the words mean wood growing, of which only a trespass could be committed. That to say you are a thief, and have stolen my timber, or my apples, or my hops, is not actionable, for it imports only a trespass; but the court ordered judgment for the plaintiff, and denied the authority of the case of Mason *v.* Thompson (Hutt. 38), in which the words "I charge thee with felony in taking forth from J. D.'s pocket, and I will prove it," were held not actionable. In 3 Salk. 325; 2 Vent. 172. 2 Lev. 51; 2 Sir T. Jo. 235, the words were "he is a clipper and coiner;" after verdict for

guage admits of a harmless as well as an injurious meaning, which is the meaning to be attached to it will be resolved by the verdict.[1] It is not sufficient to show by argument that the language will admit of some other meaning than that which obviously the jury have attached to it,[2] and therefore, after verdict for plaintiff, language which admits of an innocent and an injurious meaning will be construed to have its injurious meaning.[3] After verdict all averments on the side of the successful party which were involved in the issue tried, will be taken to have been duly proved unless the contrary appear upon the record,[4] and thus after verdict for plaintiff,

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plaintiff, it was moved in arrest of judgment that it was not a charge of clipping and coining money, but held a clipping and coining of money must be intended. Where the words were spoken by a married woman, charging a theft of *her* goods, to support a verdict it was held that she meant a theft of her goods before marriage. (Powell *v.* Plunkett, Cro. Car. 52.)

[1] Ford *v.* Primrose, 5 D. & Ry. 287; Giddins *v.* Merk, 4 Geo. 364; O'Conner *v.* Lloyd, 2 Hudson & Br. 626; Chapman *v.* Smith, 13 Johns. 78; Sherwood *v.* Chase, 11 Wend. 38.

[2] Woolnoth *v.* Meadows, 5 East, 463: Roberts *v.* Camden, 9 East, 93.

[3] "Words or signs will, after a verdict for the plaintiff, be considered by the courts to have been used in their worst sense." (1 Starkie on Slander, 60; repeated, Heard on Libel, § 173, citing Southee *v.* Denny, 1 Ex. 195; Sloman *v.* Dutton, 10 Bing. 402; 4 M. & Sc. 174; Wakley *v.* Healey, 7 Com. B. 591; Tomlinson *v.* Brittlebank, 4 B. & Adol. 630; 1 Nev. & M. 455; Francis *v.* Roose, 3 M. & W. 191; Hughes *v.* Reese, 4 M. & W. 204; Roweliffe *v.* Edmonds, 7 M. & W. 12; Digby *v.* Thompson, 4 B. & Adol. 821; 1 Nev. & M. 485; Daines *v.* Hartley, 3 Ex. 200; Read *v.* Ambridge, 6 C. & P. 308; Shipley *v.* Todhunter, 7 C. & P. 680; Chaddock *v.* Briggs, 13 Mass. 248; Goodrich *v.* Davis, 11 Metc. 473; Brown *v.* Lamberton, 2 Binney, 35; Bloom *v.* Bloom, 5 Serg. & R. 391; Cornelius *v.* Van Slyck, 21 Wend. 70; Butterfield *v.* Buffum, 9 N. Hamp. 156; Hamilton *v.* Smith, 2 Dev. & B. 274; Hancock *v.* Stephens, 11 Hump. 509; Goodrich *v.* Woolcott, 3 Cow. 231; Walton *v.* Singleton, 7 Serg. & R. 451; and see Beers *v.* Strong, Kirby, 12.)

One of the reports commenced, "Wilful and corrupt perjury;" held that, after verdict for the defendant, this must be taken as a description of the nature of the charge, not as an imputation, by the publisher, of the perjury in fact. (Lewis *v.* Levy, 1 Ellis, B. & E. 537.)

Publishing in writing that the plaintiff had realized the fable of the frozen snake; after verdict for plaintiff, the court refused to arrest the judgment, as the jury might have understood the words "frozen snake" to impute a charge of ingratitude to friends, although not so explained by innuendo. (Hoare *v.* Silverlock, 12 Ad. & Ell. N. S. 624.)

[4] Gates *v.* Bowker, 18 Verm. (3 Washb.), 23; Cass *v.* Anderson, 33 Verm. (4 Shaw)

if the language published may in its ordinary acceptation and without the aid of extrinsic circumstances be reasonably understood as having an actionable meaning, judgment will not be arrested upon the ground that the inducement and innuendoes do not sufficiently apply the language to the plaintiff, nor because the innuendoes in so far as they apply the language to the plaintiff are unwarranted.[1] If the innuendoes are unwarranted in any other respect it is a ground for arresting the judgment, of which hereafter.[2]

§ 144. We will here give some few additional illustrations of the manner in which the courts have construed certain language; many more illustrations will be found in the next succeeding chapter:

a. Adultery.—A charge of violating the seventh commandment held not to import a charge of adultery.[3]

b. And—For.—A distinction has been taken between saying, Thou art a thief, *for* thou hast stolen such a thing, as a tree, which could not be felony, and the saying, Thou art a thief, *and* hast stolen such a thing, since in the former case the subsequent words show the reason of calling the plaintiff a thief, and that no felonious imputation was meant; but in the latter, the action lies for calling him a thief, and the addition, Thou hast stolen, is another distinct sentence by itself, and not the reason of the former speech, nor any diminution thereof.[4] To say one has been in jail *for*

182; Hoyle *v.* Young, 1 Wash. 150; Ramsey *v.* Elms, 3 Jur. 1189. But nothing more will be presumed after verdict than is necessary to support the allegations. (Sweetapple *v.* Jesse, 2 Nev. & M. 36; 5 B. & Adol. 27.) Where the words taken by themselves do not necessarily import a charge of crime, yet where it is alleged in the innuendo that the defendant meant by the words that the act was maliciously done, they will be taken, after verdict, to have been intended to import such a charge. (Tuttle *v.* Bishop, 30 Conn. 80; and see Kennedy *v.* Gifford, 19 Wend. 256; Beers *v.* Strong, Kirby, 12; Ramsey *v.* Elms, 3 Jurist, 1189.)

[1] Wakley *v.* Healey, 18 Law Jour. C. P. 241; 7 C. B. 591.

[2] Note to § 362, *post.*

[3] Farnsworth *v.* Storrs, 5 Cush. 412.

[4] Cro. Jac. 114; Bull. N. P. 5; Hob. 77, 106; Cro. Eliz. 857; Browl. 2, Godb.

stealing, in some cases held not to imply that the party stole, and in others that it did. In the latter class of cases, it was said he could not be imprisoned *for* stealing if he did not steal.[1]

c. Arson.—The words "Thou set fire to those buildings, and thou wilt never be easy till thou hast told of it," do not impute arson.[2] So of the words, "he fired his house;"[3] he burnt my barn;[4] he set the store on fire, and none but him;[5] T. burned the mill himself;[6] but the words, He set fire to and burnt my factory, were construed to mean a willful burning;[7] and the words, "Public opinion says you was the author of it (firing a stable), and what public opinion says I believe to be true," held to amount to a charge of arson;[8] and so of the words, "I have every reason to believe he burnt the barn, and I believe he burnt the barn."[9] "You set your house on fire, you are a bad character," thereby meaning that plaintiff had been guilty of willfully setting his house on fire, and was a person of bad character, and had subjected himself to the penalties of the law for setting his house on

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241; Hard. 7; All. 31; Sty. 66; 1 Starkie on Slander, 99. This distinction was referred to and its correctness questioned by Holt, Ch. J., Baker *v.* Pierce, 6 Mod. 23, where it is said *and* and *for* have the same meaning; and see Lewis *v.* Acton, Yelv. 34.

[1] Vin. Abr., Act. for Words, P. *a.* 2.

[2] Rigby *v.* Heron, 1 Jur. 558.

[3] *Anon.*, 11 Mod. 220.

[4] Barham *v.* Nethersoll, Yelv. 21.

[5] McNab *v.* McGrath, 5 Up. Can. Q. B. Rep. O. S. 516.

[6] Tibbetts *v.* Gooding, 9 Gray (Mass.), 254.

[7] Tuttle *v.* Bishop, 30 Conn. 80.

[8] Gage *v.* Shelton, 3 Rich. 242. It is the general opinion of the people in J.'s (plaintiff's) neighborhood that he burnt C.'s gin-house, held actionable. (Waters *v.* Jones, 3 Port. 442.)

[9] Logan *v.* Steele, 1 Bibb, 593; I believe A. (plaintiff) burnt the camp-ground, held actionable. (Giddens *v.* Mirk, 4 Geo. 364.) My watch was stolen in Polly Miller's bar; I have reason to believe that Tina M. (plaintiff) took it, and Polly Miller, her mother, concealed it, actionable. (Miller *v.* Miller, 8 Johns. 60.)

fire, there being no *colloquium* that the words were concerning a house insured by the plaintiff against fire, nor of a house situated in or contiguous to a populous neighborhood, held on motion in arrest of judgment after a verdict for plaintiff, that the words were not actionable.[1]

d. Bawdy House.—Your house is no better than a bawdy-house, is equivalent to charging that the party kept a bawdy-house;[2] but public-house, or house of ill-fame, cannot be so construed.[3] Whore-house is equivalent to bawdy-house, or house of ill-fame.[4]

e. Bigamy.—The words "he was married to a woman (naming her), and kept her till he got sick of her, and then sent her away, having all this time two wives," amount to a charge of bigamy.[5]

f. Blackleg.—The term blackleg does not necessarily mean a cheating gambler.[6]

g. Clipper.—Where the words were, Thou art a clipper, *and* shall be hanged for it, or, Thou art a clipper, *and* thy neck shall pay for it,—it was held that the word clipper, taken in connection with the words which followed it, meant a clipping of money—a felony.[7]

h. Conspiracy.—A libel which was alleged to be concerning a false charge of felony, made through feelings of religious bigotry, by the plaintiff against one D. S., went on to allege that plaintiff was aided in making

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[1] Jackson *v.* Greer, 1 Law Reporter, 5. (London, 1821.)

[2] Huckle *v.* Reynolds, 7 C. B. (N. S.) 114.

[3] Dodge *v.* Lacey, 2 Carter (Ind.) 212. House of ill-fame means the house is one of bad reputation, not that it is a bawdy-house, unless there is an inducement that the defendant was in the habit of using the words "house of ill-fame," to convey the idea of "bawdy-house." (*Id.*)

[4] Wright *v.* Paige, 36 Barb. 438; aff'd Co't of Appeals, 3 Trans. App. 134.

[5] Parker *v.* Meader, 32 Verm. (3 Shaw) 300.

[6] Barnett *v.* Allen, 3 Hurl. & N. 376; 1 Fos. & F. 125.

[7] Walter *v.* Beaver, 3 Lev. 166; Cro. Jac. 255, 276; 1 Lev. 155.

said charge by one C. R., who were stated to "have been for some time back employing every means to win the confidence of this young gentleman, their intended victim (meaning thereby that plaintiff and said C. R. had been contriving some plan to assail the character of said D. S.), as taking him on country visits, and inviting him to the continent, with the hope, it is alleged, of getting him altogether to themselves, and destroying his prospects the more easily, by some foul charge, which he might not find means of contradicting, there being no one else of the company. They had met with a direct refusal, it seems, to their invitation to the continent, and therefore, rather prematurely, opened their present plot (meaning said charge of felony). Affidavits are, we understand, shortly to be laid before the law officers of the Crown, charging the above facts, together with certain conversations between the pair of Romanists, who have trained this ingenious manœuvre (meaning the charge of felony aforesaid)." Held that the language did not amount to a charge of conspiracy.[1]

i. Convicted Felon.—Plaintiff having been convicted of selling liquor in violation of law, was termed in a printed circular a "*convicted felon;*" held that if these terms, taken in connection with the context and the evidence, were understood to mean only an offender against the license law, they were no cause of action.[2]

j. Embracery.—Saying that A., on a certain trial, handed papers to one of the jury, and that he ran away, or the judge would have put him in prison for it,—or that he handed papers to the jury to influence or bribe them,—imputes embracery, and is actionable *per se*.[3]

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[1] O'Connell *v.* Mansfield, 9 Irish Law R. 179.

[2] Perry *v.* Mann, 1 Rhode Island, 263.

[3] Gibbs *v.* Dewey, 5 Cow. 503.

k. Forgery.—The term forgery does not necessarily mean a felonious forgery,[1] as to say one forged words and sentiments for Silas Wright;[2] and to deny having signed a note, or authorized his name being indorsed, does not import a charge of forgery;[3] nor does a charge, if you have any letters from them, you forged them;[4] or, I never put my name on the back of the note, but he must have done it.[5] A charge of altering books may impute forgery.[6] Exhibiting a note and saying, "Do you think it is G.'s handwriting," may import a charge of forgery;[7] and so the words, "He altered the note to get better security, to bind me to pay it.[8] The words, I would give five dollars if I could write as well as that,—I never signed the note,[9] do not necessarily impute forgery. But a letter charging plaintiff with having subscribed defendant's name to a receipt without authority, and to defraud him out of the money, and adding, It is not my purpose to call hard names—the statute fixes the name and punishment, imputes forgery.[10]

l. Fornication.—To allege that a woman is not a decent woman,[11] or a bad character, a loose character,[12] or has raised a family of children to a negro, does not amount to a charge of fornication;[13] but to say of an unmarried woman, she had a child and buried it in

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[1] Alexander *v.* Alexander, 9 Wend. 141. See § 167, *post.*
[2] Cramer *v.* Noonan, 4 Wis. 231.
[3] Andrews *v.* Woodmansee, 15 Wend. 232.
[4] Mills *v.* Taylor, 3 Bibb, 469.
[5] Atkinson *v.* Scammon, 2 Fost. 40.
[6] Gay *v.* Homer, 13 Pick. 535.
[7] Gorham *v.* Ives, 2 Wend. 534.
[8] Harmon *v.* Carrington, 8 Wend. 488.
[9] Andrews *v.* Woodmansee, 15 Wend. 232.
[10] Snyder *v.* Andrews, 6 Barb. 43.
[11] Dodge *v.* Lacey, 2 Carter (Ind.), 212.
[12] Vanderlip *v.* Roe, 25 Penn. St. Rep. (11 Harris), 82.
[13] Patterson *v.* Edwards, 2 Gilman, 720.

the garden, imputes fornication.[1] To say "Malvina (plaintiff) has been to swear a young one," fairly conveys the idea that the plaintiff had been guilty of fornication.[2] So do, with proper innuendoes, the words "A. caught them (plaintiff and B.) together in the packing-room."[3] "There is no offense which can be conveyed in so many multiplied forms and figures as that of incontinence. The charge is seldom made, even by the most vulgar and obscene in broad and coarse language."[4]

m. Kill—Killed—Killing.—The words kill, killed, and killing, unexplained, have a felonious signification.[5] The words, "I think the business ought to have the most rigid inquiry, for he murdered his first wife, that is, he administered improperly medicines to her for a certain complaint, which was the cause of her death," after verdict for plaintiff, held actionable as imputing a charge of manslaughter.[6]

n. Knave.—Imports dishonesty.[7]

o. Known.—Stating plaintiff is about to commence an action, but that he will not bring it to trial in a particular county because he is *known* there, amounts to a charge that the plaintiff is in bad repute in that county.[8]

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[1] Worth *v.* Butler, 7 Blackf. 251. See § 172, *post.* Scandalous and familiar converse with a woman can only mean illegal connection. (Patterson *v.* Patterson, 15 Law Times, 539.)

[2] Patterson *v.* Wilkinson, 55 Maine, 42.

[3] Evans *v.* Tibbins, 2 Phila. 210.

[4] Duncan J. Walton *v.* Singleton, 7 S. & R. 457.

[5] Carroll *v.* White, 33 Barb. 620; Button *v.* Hayward, 8 Mod. 24; Cooper *v.* Smith, Cro. Jac. 423; Hays *v.* Hays, 1 Hump. (Tenn.) 402; Taylor *v.* Casey, Minor (Ala.), 258; Ecart *v.* Wilson, 10 Ser. & R. 44; Johnson *v.* Robertson, 4 Porter, 486; Chandler *v.* Holloway, *id.* 18; Edsall *v.* Russell, 5 Scott, N. R. 801; 2 Dowl. N. S. 614; 4 Man. & G. 1090.

[6] Ford *v.* Primrose, 5 Dowl. & R. 287. See § 168, *post.*

[7] Harding *v.* Brooks, 5 Pick. 244. See § 173, *post.*

[8] Cooper *v.* Greely, 1 Denio, 347.

p. Larceny.—The words, A man that would do that would steal, do not impute a larceny;[1] but to say one was whipped for stealing hogs, does.[2] You will steal, imputes a charge of larceny.[3] The words "he is mighty smart after night," and "put him in the dark, and he would get it all," spoken with reference to a dispute which existed between plaintiff and defendant, relative to the division of a certain tan-yard; held not to impute the crime of larceny, and not actionable.[4] I have reason to suppose that many of the flowers of which I have been robbed are growing on your premises, held to amount to a charge of larceny.[5] The words, "my table-cloths are gone, and you know where they are gone. If you will bring them back, I will say nothing about it. My husband has gone down town to get a warrant to search your house and imprison you," impute a crime.[6]

q. Liar.—The words, "this is not the first time the idea of falsehood and B. (plaintiff) have been associated in the minds of many honest men," import that B. is a liar.[7]

r. Made away with.—A charge of making away with does not amount to a charge of larceny.[8]

s. Murder.—To say one is *guilty* of the death of another imports a charge of murder. The word *guilty* im-

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[1] Stees *v.* Kemble, 27 Penns. 112; and see Stolen, p. 195, *post.*

[2] Holly *v.* Burgess, 9 Ala. 728.

[3] Cornelius *v.* Van Slyck, 21 Wend. 70.

[4] Kirksey *v.* Fike, 29 Ala. 206.

[5] Williams *v.* Gardiner, 1 M. & W. 245; and see note 2, p. 174, *ante.*

[6] Hess *v.* Jockley, 25 Iowa, 9.

[7] Brooks *v.* Bemiss, 8 Johns. 455.

[8] The words, "Uncle Daniel must settle for some of my logs he has made away with," do not of themselves amount to a charge of larceny. (Brown *v.* Brown, 2 Shep. 317.) A charge of carrying away corn does not impute felony, but trespass (Stitzell *v.* Reynolds, 59 Penns. 488.) Go home and steal more potatoes from Peggy's field, held actionable. (Hunter *v.* Hunter, 25 Up. Can. Q. B. 145.)

plies a malicious intent, and can be applied only to something which is universally allowed to be a crime. But to say one was the *cause* of another's death does not import a crime, for a physician may be the cause of a man's death, and very innocently.[1]

t. Packing.—The charge of "packing a jury" imports the corrupt selection of a jury.[2]

u. Perjury.—To publish a direct and positive contradiction of what a witness, at a certain trial, had sworn that A. had said; *held*, not to amount to a charge of perjury.[3] Nor do the words, Thou wert detected of perjury, imply being guilty of perjury.[4] Words charging a grand juror with having "forsworn himself by neglecting or refusing to present an offense within his knowledge," do not amount to a charge of perjury, or any indictable offense.[5] To say one is forsworn, was indicted for it, and compounded for it, imputes perjury; for the alleged compounding is equivalent to a confession of the indictment being true.[6] And to say, Thou art forsworn, and I will set thee on the pillory, or I will have his ears cropt, imply perjury.[7] Loss of life was occasioned by the collision of two steamboats. An inquest was afterwards held, and a person named Granger, who was

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[1] Peake *v.* Oldham, Cowp. 275; Miller *v.* Buckdon, 2 Bulst. 10. See § 168, *post.*

[2] Mix *v.* Woodward, 12 Conn. 262.

[3] Steele *v.* Southwick, 9 Johns. 214. See *post* in note to § 171; Perselly *v.* Bacon, 20 Miss. 330; Kern *v.* Towsley, 51 Barb. 385.

[4] Vin. Abr., Act. for Words, P. *a.* 21. The words, Thou didst take a false oath before Justice Scawen, may mean not a justice of the peace named Scawen, but one named Justice Scawen. (Garnett *v.* Derry, 3 Lev. 166), note to § 177, *post;* and Call *v.* Foresman, 5 Watts, 331 in § 321, *post.*

[5] McAnnally *v.* Williams, 3 Sneed, 26.

[6] Gilberd *v.* Rodd, 3 Bulst. 304.

[7] Williams *v.* Bickerton, Het. 63; Vin. Abr., Act. for Words, F. *a.* 11. "I could prove J. S. perjured, if I would" implies that J. S. committed perjury. (*Id.*)

on board of one of the steamboats at the time of the accident, gave his evidence. The defendant, in giving an account of the accident and inquest, stated—"Had requisite means been employed, the lives of the two children might have been saved, in spite of the story of Mr. Granger, who swore through thick and thin, and who, although asleep at the moment of the accident, had yet sufficient time to dress himself and assist his wife:" *held*, that the language did not charge Granger with perjury.[1] The following was published by A.: "Charge 4. Refusing to correct G. C. in his statement as a witness before Esq. B., when I believe he, J. C., knew his, G. C.'s statement, was not true." *Held*, that this writing, when shown by proper innuendoes to have been applied by A. to the testimony of G. C., on the trial of a cause, imputed perjury to G. C., and was actionable.[2]

v. Pilfering.—The term pilfering imports a crime.[3]

w. Plundered.—The term plundered does not import a felonious taking.[4]

x. Poison.—Saying of a surgeon that he did poison the wound of his patient, may mean that he poisoned the wound to cure it. But if it be charged that he poisoned the wound to get money, that is different.[5]

y. Prostitute.—She is a bad girl, and unworthy to be employed, will not support an innuendo, a prostitute.[6] "If I am not misinformed, she is a prostitute," is the same as saying she is a prostitute.[7]

z. Robbed—Robbing.—The *prima facie* meaning of rob-

[1] Reg. *v.* Marshall, 2 Jur. 254; and see note to § 137, *ante*.

[2] Coombs *v.* Rose, 8 Blackf. 155.

[3] Beckett *v.* Sterrett, 4 Blackf. 499; *contra*, see Carter *v.* Andrews, 16 Pick. 1.

[4] Carter *v.* Andrews, 16 Pick. 1.

[5] Vin. Abr., Act. for Words, *R. a.* 10, 40.

[6] Snell *v.* Snow, 13 Met. 278.

[7] Treat *v.* Browning, 4 Conn. 408.

bed is to impute a crime, an unlawful taking;[1] but the words, You have robbed me of one shilling tan money, amount only to a charge of embezzlement.[2] Robbing is a word of an uncertain signification.[3] The words, "He robbed the treasury, and bought a farm with it," were held not to impute felony.[4]

a. a. Shaving Purposes.—Shaving, as applied to promissory notes, means buying notes at a discount, beyond the debt and interest, which is neither dishonorable nor discreditable.[5]

b. b. Steal—Stolen.—The natural and obvious meaning of steal is a felonious taking or larceny.[6] The term stolen imputes a larceny.[7] Stealing unexplained, *ex vi termini*, imports felony.[8] Stealing and feloniously stealing are not the same; in common parlance, stealing does not always import felony.[9] If the article alleged to have been stolen is of the kind of which felony can be committed, the term steal or stolen imputes a larceny, otherwise if the article alleged to have been stolen could not be the subject of a felony.[10] Thus it has been held not actionable to say, You stole my wood,[11] or my apples;[12] or a load of hop-

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[1] Tomlinson *v.* Brittlebank, 1 Nev. & M. 455; Jones *v.* Chapman, 5 Blackf. 88; Heard on Libel, § 38.

[2] Day *v.* Robinson, 1 Ad. & El. 554.

[3] Palmer *v.* Edwards, Rep. of Cas. of Prac. in C. P. 160.

[4] Allen *v.* Hillman, 12 Pick. 101. The words "You did rob the town of St. Cloud; you are a public robber," are not actionable, for the crime of robbery cannot be committed against a town. (McCarty *v.* Barrett, 12 Minn. 494.) See § 170, *post.*

[5] Stone *v.* Cooper, 2 Denio, 293.

[6] Dunnell *v.* Fiske, 11 Metc. 551. See § 170, *post.*

[7] Burbank *v.* Horn, 39 Maine (4 Heath), 233; Coleman *v.* Playsted, 36 Barb. 26; *contra*, Dunnell *v.* Fiske, 11 Metc. 551; St. Martin *v.* Desnoyer, 1 Min. 156.

[8] Powell, J., Baker *v.* Pierce, 6 Mod. 23.

[9] Holt, Ch. J., Baker *v.* Pierce, 6 Mod. 23.

[10] Cock *v.* Weatherby, 5 Smc. & M. 333. See note p. 173, *ante.*

[11] Meaning standing timber. Robins *v.* Hildredon, Cro. Jac. 65; Idol *v.* Jones, 2 Dev. 162; Heard on Libel, 37, note 3; *contra*, Phillips *v.* Barber, 7 Wend. 489.

[12] Clark *v.* Gilbert, Hob. 331.

poles;[1] or a tree;[2] or a dog;[3] or a bee-tree;[4] or wild bees;[5] or a sable caught in a trap;[6] or marl, earth, or furze;[7] because felony cannot be committed of such things. A charge of having stolen boards,[8] or "my box-wood,"[9] held to impute a larceny; and a charge of stealing the property of A., deceased, imports a larceny from the personal representatives of A.[10] He will steal, and I can prove it, is equivalent to saying he had stolen;[11] and to allege, I will venture anything he has stolen the book, is equivalent to a charge of stealing the book.[12] To say, You are as bad as your wife when she stole my cushion, is not a charge of stealing, without an averment that the wife had committed felony.[13]

c. c. Suffer.—To *suffer*, held to import suffer death, as where the defendant said, "I will make you *suffer* for a witch," it was held to mean suffer death for a witch.[14]

d. d. Taken.—Words which charge the taking of the personal property of another, may be slanderous or not,

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[1] Guilderslew *v.* Ward, Cro. Eliz. 225; Dexter *v.* Taber, 12 Johns. 239.

[2] Cook *v.* Gilbert, Hob. 77. See Bryan *v.* Wikes, Cro. Car. 572.

[3] Findlay *v.* Bear, 8 Serg. & R. 571.

[4] Cock *v.* Weatherby, 5 Sme. & M. 333.

[5] Wallis *v.* Mease, 3 Binn. 546; Gillet *v.* Mason, 7 Johns. 16.

[6] Norton *v.* Ladd, 5 N. Hamp. 203.

[7] Ogden *v.* Riley, 2 Green, 186; Clarke *v.* Gilbert, Hob. 331.

[8] Burbank *v.* Horn, 39 Maine (4 Heath), 233.

[9] After verdict for plaintiff. Baker *v.* Pierce, 6 Mod. 23.

[10] Bash *v.* Sommer, 20 Penn. St. R. 159.

[11] Cornelius *v.* Van Slyck, 21 Wend. 70.

[12] Nye *v.* Otis, 8 Mass. 122.

[13] Upton *v.* Pinfold, Comyn's R. 268. The words, "I expect Murphy will have plenty of bacon to sell, as he has killed some of my hogs," after verdict for plaintiff, were held to amount to a charge of hog-stealing. (Murphy *v.* Antley, 2 Boston Monthly Law Rep. N. S. 520.) R. S. was attainted of felony, and defendant said, You (plaintiff) have done as ill and worse; it will not cost you as much to be quit as it cost him. Court doubted if actionable. (Smith's Case, Cro. Eliz. 31.)

[14] Stephens *v.* Corben, 3 Lev. 394.

according to circumstances.[1] Ordinarily, *taken* is not equivalent to stolen;[2] but where the words were, I have lost a calf-skin, * * Bornman must have taken it, they were held to impute a larceny.[3]

e. e. Thief.—To call one thief is not actionable, unless it is intended to impute to him a felony.[4] Unexplained, it will be construed in a felonious sense,[5] but subject to explanation by the context.[6] To say of one, he is a *thieving* person,[7] or "he gets his living by thieving,"[8] is the same as saying he is a thief.

f. f. Threatening Letters.—A charge of sending threatening letters, and that the plaintiff had been indicted therefor, must mean that they were unlawful threatening letters.[9]

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[1] Watson *v.* Nicholas, 6 Hump. 174.

[2] Robertson *v.* Lea, 1 Stew. 141; Coleman *v.* Playstead, 36 Barb. 26. The words, Thou hast picked my pocket, and *taken away* ten shillings, held not actionable, although the charge of picking the pocket without more would be. (Humfries' Case, cited Godb. 287.) Taking away implies a lawful taking. (Foster *v.* Browning, Cro. Jac. 688, pl. 2; Wilks' Case, Vin. Abr., Act. for Words, R. *a.* 3); see Dottarer *v.* Bushey, 16 Penn. 204.

[3] Bornman *v.* Boyer, 3 Binn. 515. He is a thief, for he hath *stolen* corn from Mr. Kay, held actionable (Smith *v.* Ward, Cro. Jac. 673), for corn threshed, and not in the sheaf, shall be intended; but if the words had been *hath taken away*, instead of *hath stolen*, no action would lie—a lawful taking would be intended. (Foster *v.* Browning, Cro Jac. 688, pl. 2); see Lukehart *v.* Byerly, 53 Penns. 418.) Thou art as arrant a thief as any in England, for thou hast broken up J.'s chest, and *taken away* £40; not actionable. (*Id.*) Thou art a thief, for thou takest my beasts by reason of an execution, and I will hang thee. (Wilks' Case, Vin. Abr., Act. for Words, R. *a.* 3.)

[4] Brite *v.* Gill, 2 Monroe (Ky.), 66; Quinn *v.* O'Gara, 2 E. D. Smith, 388.

[5] Penfold *v.* Westcote, 2 New Rep. 335; Curtis *v.* Curtis, 10 Bing. 477; Fisher *v.* Rotereau, 2 M'Cord, 189; Dudley *v.* Robinson, 2 Iredell, 141. The words, He is a thief and a liar, and I can prove it, import a charge of larceny, and are actionable. (Robinson *v.* Keyser, 2 Foster (N. Hamp.), 323.)

[6] Thompson *v.* Bernard, 1 Camp. 48; Christie *v.* Powell, Peake's Cas. 4; McKee *v.* Ingalls, 4 Scam. 30; Ogden *v.* Riley, 2 Green, 186; Vin. Abr., Actions for Words, G. *a.* 1, 2. To say, "Thou art as very a thief as any in Warwick gaol," no thief being then in the gaol, would not be actionable, but if a thief is in the gaol at the time the words would be actionable. (Fenner, J., 1 Bulst. 40.)

[7] Alley *v.* Neely, 5 Blackf. 200.

[8] Rutherford *v.* Moore, 1 Cr. C. C. 388.

[9] Harvey *v.* French, 1 Cr. & M. 1, aff'd 2 M. & Sc. 591. "Threatening letters. The

g. g. Unnatural Offense.—To allege that one has been with a beast,[1] was seen *ravishing* a cow, amounts to a charge of buggery;[2] but an allegation that one was seen *a foul* of a cow, or "*with a* heifer,"[3] do not amount to a charge of buggery. To say of one, his character is infamous, he would be a disgrace to any society; I will publish his infamy; delicacy forbids me bringing a direct charge, but it was a male child who complained to me; held to impute unnatural practices without an innuendo.[4]

h. h. Whore.—To assert that "A. is a whore, or else she would never ride with B.," is to assert that A. is a whore.[5]

i. i.—To say, there is strong reason to believe,[6] or there is a rumor,[7] or if report be true,[8] a certain fact occurred, is equivalent to an allegation that such fact occurred; and so to say, I would venture anything,[9] or public opinion says so, and what public opinion says I believe to be true,[10] or I have every reason to believe,[11] is equivalent to a positive allegation. But the words "Sparkham did steal *or else* Godwin is forsworn, was held too indirect a charge to give a right of action,[12]

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grand jury have returned a true bill against a gentleman named French," construed to mean that the grand jury had found a true bill against French for sending threatening letters, but that the words would not bear the meaning that French had sent threatening letters to extort money. (*Id.*)

[1] Woolcott *v.* Goodrich, 5 Cow. 714.

[2] Harper *v.* Delph, 3 Ind. 225.

[3] *Id.*; Johnson *v.* Hedge, 6 Up. Can. Q. B. Rep, 337.

[4] Woolnoth *v.* Meadows, 5 East, 463. See note 1, on page 168, *ante.*

[5] True *v.* Plumley, 36 Maine, 466. "E. P. was one week in L. in a whore-house," implies a charge of whoredom (Blickenstaff *v.* Perrin, 27 Ind. 527.)

[6] Turner *v.* Merryweather, 12 Law Times, 474; 7 C. B. 251.

[7] Kelly *v.* Dillon, 5 Porter (Ind.), 426.

[8] Smith *v.* Stewart, 5 Barr, 372; Johnson *v.* Brown, 57 Barb. 118.

[9] Nye *v.* Otis, 8 Mass. 122.

[10] Gage *v.* Shelton, 3 Rich. 242; and see note 8, p. 187, *ante.*

[11] Logan *v.* Steele, 1 Bibb, 593; and see note 9, p. 187, *ante.*

[12] 1 Starkie on Slan. 70.

so of the allegation she had a child, and either she or some one else made away with it.[1]

j. j.—To say of one, he is thought no more of than a horse-thief and a counterfeiter, is to call him a horse-thief and a counterfeiter;[2] and when it said of one, he has committed an act for which he could be transported, it must be understood he has been guilty of a crime punishable by transportation.[3]

k. k.—To charge, he has broken open my letters in the post-office, do not import an unlawful breaking open.[4]

l. l.—Thou canst not *read* a declaration, construed to mean from ignorance, not blindness.[5]

m. m.—The words "we again assert the cases formerly put by us on record, we assert them against [the plaintiff]; we again assert they are such as no gentleman or honest man would resort to." Construed not to be a mere denial of some assertion made by plaintiff, but as an accusation against the plaintiff.[6]

n. n.—"He was an United Irishmen, and got the money of the United Irishmen into his own hands and ran away with it," imputes a breach of trust, not a felony, and not actionable.[7]

§ 145. What allegations are divisible? One rule whereby to test whether a charge is divisible or not, is to inquire if the measure of damages would be different for the whole or for a part; and if it would, then the charge

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[1] Carth. 55. The words thy brother was whipped for stealing sheep, or burned in the hand or shoulder, held too uncertain to warrant an action, as one could not be burned in the shoulder for stealing sheep. (Stirley *v.* Hill, Cro. Car. 283.)

[2] Nelson *v.* Musgrave, 10 Mo. R. 649.

[3] Curtis *v.* Curtis, 4 Mo. & S. 337; 10 Bing. 477.

[4] McCuen *v.* Ludlam, 2 Har. 12.

[5] Powell *v.* Jones, 1 Lev. 297.

[6] Hughes *v.* Rees, 4 M. & W. 204.

[7] McClurg *v.* Ross, 5 Binn. 218; and see Caldwell *v.* Abbey, Hardin, 529; Huron *v.* Smith, 4 B. Monr. 385.

is divisible, and part may be justified.[1] Another rule would be to inquire if a part of the charge would sustain an action. Where the charge was that the plaintiff, a proctor, had been suspended three times for extortion, held divisible, and that the defendant might justify as to one suspension.[2] Where the alleged defamatory matter professed to give a report on an election petition, and commented on a person, bail for one of the petitioners, and stated "he is hired for the occasion," held divisible.[3] The charge was acts of barbarity to a horse, and "beating out one of his eyes, and that plaintiff had ordered the person having charge of the horse, not to let any one see it," held divisible.[4] So of the words; Ware, hawk, you must take care of yourselves there, mind what you are about;[5] and where the charge was that plaintiff had killed his adversary in a duel, and that a portion of the night preceding the duel was spent in practicing with a pistol, held to be divisible allegations;[6] and where the charge was that the plaintiff had, by furious driving, caused the death of a person and then commented, in terms held to be actionable, on the fact of the plaintiff, on the same evening, attending a public ball, held that the charges were divisible;[7] so of the words, she is a forsworn whore and a perjured whore,[8] and Thou are a roguish knave and a thief.[9] Where the charge was that plaintiff was in prison and unable to pay his rent, and a mere man of

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[1] Clarkson *v.* Lawson, 6 Bing. 587; Cooper *v.* Lawson, 1 Perr. & D. 15; Churchill *v.* Hunt, 2 B. & A. 685.

[2] Clarkson *v.* Lawson, 6 Bing. 587.

[3] Cooper *v.* Lawson, 1 Perr. & D. 15.

[4] Weaver *v.* Lloyd, 2 B. & Cr. 678; 4 D. & R. 230.

[5] Orpwood *v.* Barkes, 4 Bing. 261; S. C. sub. nom. Orpwood *v.* Parkes, 12 Moore, 402.

[6] Helsham *v.* Blackwood, 11 C. B. 111; 5 Eng. Law & Eq. R. 409.

[7] Churchill *v.* Hunt, 2 B. & A. 685; 1 Chit. 480.

[8] Wales *v.* Norton, Hard. 7.

[9] Bailey *v.* Maynard, 2 Bulst. 134.

straw, held not divisible, but one charge of insolvency.[1] Allegations of time, and space, and number, are divisible.[2]

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[1] Eaton *v.* Johns, 1 Dowl. Pr. C. N. S. 602.

[2] Monkman *v.* Shepherdson, 3 Perr. & D. 182; 11 Ad. & El. 411; so said in argument, Page *v.* Hatchett, 6 Law Times, 218; and as to divisible allegations, see McGregor *v.* Gregory, 2 Dowl. Pr. C. N. S. 769; 11 M. & W. 289; Nelson *v.* Patrick, 3 C. B. 772; Mountney *v.* Watton, 2 B. & Ad. 673; Tapley *v.* Wainwright, 5 B. & Adol. 395, cited, Dunckle *v.* Wiles, 6 Barb. 523; Vessey *v.* Pike, 3 C. & P. 512; Berry *v.* Adamson, 2 C. & P. 503; O'Connell *v.* Mansfield, 9 Ir. Law R. 179; Edwards *v.* Bell, 1 Bing. 403; Lewis *v.* Walter, 4 Dowl. & R. 810; 3 B. & Cr. 138; Johns *v.* Gittings, Cro. Eliz. 239; Vin. Abr. Act. for Words, *F. a*, 43; Heard on Libel, 286, note 2 and 4 M. & S. 548; Chalmers *v.* Shackell, 6 C. & P. 474.

CHAPTER VIII.

WHAT LANGUAGE IS ACTIONABLE.

Language must be such as does or does not occasion damage — What is meant by actionable per se, *and actionable by reason of special damage— What language concerning a person as such, published orally, is actionable* per se— *What language concerning a person as such, published in writing, is actionable* per se— *What language concerning one in an acquired capacity, is actionable* per se— *What language concerning a person is actionable by reason of special damage— What language concerning the affairs of a person, his property or his title thereto, is actionable.*

§ 146. All language concerning a person or his affairs, which, as a necessary or natural and proximate consequence, occasions him pecuniary loss, is *prima facie* actionable (§§ 57, 59, 70). Language must be either (1) such as necessarily, in fact, or by a presumption of evidence, occasions damage to him whom or whose affairs it is concerning, or (2) such as does not necessarily, or as a necessary consequence, but does by a natural and proximate consequence, occasion damage to him whom or whose affairs it is concerning, or (3) such as neither as a necessary nor as a natural and proximate consequence occasions damage to him whom or whose affairs it is concerning.[1] The loss which ensues as a "*necessary consequence*," is termed *damage;* the loss which ensues as a "*natural and proximate consequence*," is termed "*special damage.*" One and the

[1] In the jurisprudence of Louisiana, a distinction is not made between words, actionable and words not actionable, as the basis of damages in a suit for slander, where no special damages are proved. (Feray *v.* Foote, 12 La. Ann. 894.)

same set of words may both necessarily occasion damage and also occasion damage as a natural consequence.

§ 147. Language of the first of these classes is commonly termed libellous *per se*, or actionable *per se*, because its publication confers a *prima facie* right of action, and is *prima facie* a wrong without any evidence of damage other than that which is implied or presumed from the fact of publication. Probably language of this class might more correctly be termed injurious *per se*, or language which imports damage.

§ 148. The publication of language of the second of these classes does not, *per se*, confer a *prima facie* right of action, and is not, *per se*, a *prima facie* wrong. It confers a right of action only in those cases in which, as a natural and proximate consequence of the publication, loss (special damage) has in fact ensued to him whom or whose affairs the language was concerning.

§ 149. The publication of language of the third of these classes cannot in any event amount to a wrong, and cannot in any event confer a right of action.

§ 150. We attempted to explain in Chapter IV. that pecuniary loss, actual or presumed, is the gist of the action for slander or libel, and we stated (pp. 101, 102) the basis, as we suppose, of the distinction between words actionable *per se* and words only actionable by reason of special damage, to consist solely of a rule of evidence; the rule by which courts decide what words[1] shall be considered by their publication *necessarily* to occasion pecuniary loss or damage. The courts, while exercising this power, have failed to promulgate a formula which can be applied with

[1] Words mean written or spoken words (Minter *v.* Stewart, 2 How. (Mis.) 183), and an action for written slander may be an action for "slanderous words" within the Vermont Judiciary Act (Parsons *v.* Young, 2 Verm. 434), but see note 1, p. 141, *ante*. And in Hall *v.* Warner, T. 24 Geo. III., Tidd, 861, held that an action for libel was not within statute 21 Jac. I., ch. 16, relating to actions for "slanderous words."

any degree of certainty, to distinguish the cases in which damage is necessarily implied, from the cases in which no such implication occurs, and in which to give a right of action special damage must be proved.

§ 151. As the injurious, or presumed injurious effect of language depends upon whether (1) the language concerns a person or a thing (2) or the person as such or in some acquired capacity, or (3) in certain cases, whether the language be published orally or by writing, it will be necessary to consider the topic of actionable language under the following heads:

I.—What language concerning a person, as such, published orally, is actionable *per se.*

II.—What language concerning a person as such, published in writing, is actionable *per se.*

III.—What language concerning one in an acquired capacity or special character, as in a business, profession, or office, or as partner, or as heir-at-law, is actionable *per se.*

IV.—What language is actionable by reason of special damage.

V.—What language concerning things, as the affairs of a person, his property, or his title thereto, is actionable.

§ 152. What language concerning a person, as such, published orally, is actionable *per se?* Although it has been said that "The law of England defines with much greater distinctness than is usually found in other codes, the limits of the civil action for oral slander in the absence of special damage,"[1] it is nevertheless true that

[1] Prelim. Discourse to Starkie on Slander, XXX. (30), note v.; see note to § 57, *ante.* In Scotland, any words that produce "uneasiness of mind" are said to be actionable. (Borthwick on Libel, 184, note.) But words merely "uncivil" are not actionable. In Iceland, to say of a gentleman he did menial labor is punishable. (Blackwood's Magazine, Feb'y. 1869.) Mere words of obloquy, not written, are not actionable. (Johnson *v* Brown, 4 Cr. C. C. 235.)

"There is not perhaps so much uncertainty in the law upon any subject, as when words shall be in themselves actionable."[1] "The line of demarcation seems never to have been satisfactorily defined,"[2] and is "more satisfactorily determined by an accurate application of the principles upon which actions on the case for words depend, than by a reference to adjudged cases, especially those in the more ancient authors."[3] The diversity of opinion as to what words should be treated as imputing damage, or actionable *per se*, arose from a wavering in the minds of the judges between two opposite inconveniences. The fear of encouraging a spirit of vexatious litigation, by affording too great a facility for this species of action, was contrasted with the mischief resulting to the public peace from refusing legal redress; and according as the former or latter of these considerations preponderated, so was the rule of decision rigid or relaxed.[4]

§ 153. Several of the States provide by statute what words shall be actionable; thus, in Mississippi, Virginia, and Georgia, it is enacted that all words which from their usual construction and common acceptation are considered as insults and lead to violence and breach of the peace, shall be actionable.[5] In Tennessee, imputing adultery or fornication, or calling one coward or poltroon for not fighting a duel, is actionable. In Arkansas and Illinois, to impute adultery, fornication, or false swearing, or having sworn [or affirmed in Illinois] falsely in common acceptation, whether in a judicial proceeding or not, is

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[1] Spencer, J., Brooker *v.* Coffin, 5 Johns. 192.

[2] Borthwick on Libel, 5; Lord Holt said it was not worth while to be learned on the subject. Baker *v.* Pierce, 6 Mod. 24.

[3] 1 Comyn's Dig. 273, note, 4th edit.

[4] 1 Starkie on Slander, 12.

[5] It is not necessary, to support an action under these statutes, that the words should have been spoken in the presence of the plaintiff. (Scott *v.* Peebles, 2 Smedes & Marsh. 546.)

actionable. In Missouri, to impute adultery or fornication is actionable. In Indiana, to impute to a female incest, fornication, adultery, or whoredom, or to impute to any one incest, or an infamous crime against nature with man or beast, is actionable. In Florida, *a charge by any* citizen of that State against another, imputing incest, fornication, or adultery, is actionable. In North Carolina, any words spoken of a female which amount to a charge of incontinency, are actionable; and in Maryland, all words tending to the injury of the reputation for chastity of a *feme sole*, are actionable.[1] In Michigan, willfully to insult or indecently to annoy any female, with any obscene or indecent word or act, is a misdemeanor; and in New York,[2] "An action may be maintained by a female, whether married or single, to recover damages for words hereafter spoken, imputing unchastity to her, and it shall not be necessary to allege or prove special damages in order to maintain such action. In such actions, a married woman may sue alone, and any recovery therein shall be her sole and separate property."

§ 153*a*. In the absence of any statutory provision on the subject, all language concerning a person in his individual capacity merely, when published orally, is actionable *per se*, which,

I. Charges an indictable offense involving moral turpitude; or,

II. Charges the being afflicted with certain diseases.

§ 154. In New York, oral language is actionable *per se*, when it imputes a charge which if true will subject the party charged to an indictment for a crime involving moral turpitude, *or* subject him to an infamous punishment. This was the rule laid down by Justice Spencer,

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[1] See in note p. 76, *ante*, and note to § 171, *post*.

[2] Laws N. Y. 1871, ch. 219, took effect 29th March, 1871.

in Brooker *v.* Coffin,[1] and as to which Justice Bronson said, that although it was not entirely satisfactory to his mind, he felt bound to follow it.[2] It was proposed by counsel to modify the rule as stated above by altering *or* into *and*, but the court refused assent to the suggestion,[3] and the rule, as laid down in Brooker *v.* Coffin, has been followed in numerous cases in New York and other States.[4] In reference to the above rule it has been remarked that "when the courts say the words are actionable if they subject the party to indictment and *infamous* punishment, provided they be true, we clearly understand what is the extent of the rule;" but when they add "or subject the party to an indictment for an offense involving *moral turpitude*, we are left in doubt what charges are embraced within the sentence; it lacks precision."[5] And again, "This element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accomodated to the common sense of the community."[6] Chief Justice Parker refused to adopt the rule as laid

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[1] 5 Johns. 188.

[2] Young *v.* Miller, 3 Hill, 22.

[3] Widrig *v.* Oyer, 14 Johns. 124.

[4] Wright *v.* Paige, 36 Barb. 438; aff'd 3 Trans. App. 134; Quin *v.* O'Gara, 2 E. D. Smith, 388; Martin *v.* Stillwell, 13 Johns. 275; Burtch *v.* Nickerson, 17 Johns. 219; Van Ness *v.* Hamilton, 19 Johns. 367; Gibbs *v.* Dewey, 5 Cow. 503; Demarest *v.* Haring, 6 Cow. 88; Crawford *v.* Wilson, 4 Barb. 504; Alexander *v.* Alexander, 9 Wend. 141; Hoag *v.* Hatch, 23 Conn. 590; Andres *v.* Koppenheafer, 3 Serg. & R. 255; Todd *v.* Rough, 10 Serg. & R. 18; McCuen *v.* Ludlam, 2 Harrison (N. J.), 12; Johnson *v.* Shields, 1 Dutcher, 118; Giddens *v.* Mirk, 4 Geo. 360; Burton *v.* Burton, 3 Iowa, 316; Gage *v.* Shelton, 3 Rich. 242; Kinney *v.* Hosea, 3 Harr. 77; Coburn *v.* Harwood, Minor, 93; Perdue *v.* Burnett, Minor, 138; Hilhouse *v.* Peck, 2 Stew. & Por. 395; Johnston *v.* Morrow, 9 Porter, 525; Taylor *v.* Kneeland, 1 Doug. (Mich.), 67; Beck *v.* Stitzel, 21 Penn. St. R. 522; Billings *v.* Wing, 7 Verm. 439; The State *v.* Burroughs, 2 Halst. 426; 1 Amer. Lead. Cas. 113, 3d ed.

[5] Daniel, J., Skinner *v.* White, 1 Dev. & Bat. 471; and see Brady *v.* Wilson, 4 Hawks, 93; Wall *v.* Hoskins, 5 Ired. 177; Shipp *v.* McCraw, 3 Murph. 463.

[6] Lowrie, J., Beck *v.* Stitzel, 21 Penn. St. Rep. 522.

down in Brooker *v.* Coffin, *supra*, and laid down the rule as thus: an accusation is actionable whenever an offense is charged which, if proved, may subject the party to a punishment, though not ignominious, and which brings disgrace upon him.[1] The same judge has also laid down the rule as thus: "Words imputing crime in the party against whom they are spoken, which if true would subject him to disgraceful punishment, are actionable without special damages."[2] To render the imputation of a crime actionable there needs not the same certainty in stating the crime as in an indictment for such a crime.[3]

§ 155. The following offenses, among others, have been held to involve *moral turpitude:* keeping a bawdy-house,[4] removing land marks,[5] selling spirituous liquor to

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[1] Miller *v.* Parish, 8 Pick. 385.

[2] Chaddock *v.* Briggs, 13 Mass. 248; and to the like effect, Bloss *v.* Tobey, 2 Pick. 320; "Words to be actionable must charge an offense subject to corporal or infamous punishment." (Elliott *v.* Ailsberry, 2 Bibb, 473: McGee *v.* Wilson, Lit. Sel. Cas. 187.) Words are not actionable *per se* when "they impute no crime which could be visited by infamous punishment." (Buck *v.* Hersey, 31 Maine, 558; Gosling *v.* Morgan, 32 Penn. State Rep. (8 Casey), 273.) The charge of a misdemeanor to be actionable *per se* must be one which "implies some heinous offense involving moral turpitude." (Mills *v.* Wimp, 10 B. Monroe, 417.) Dotharer *v.* Bushey, 4 Harris, 204; Stitzell *v.* Reynolds, 9 P. F. Smith, 488. An indictment lies for many acts not involving moral turpitude. (Quinn *v.* O'Gara, 2 E. D. Smith, 388.)

Words charging an offense involving moral turpitude and indictable, although not subjecting the offender to infamous punishment, are actionable in themselves. (Perdue *v.* Burnett, Minor, 138.)

Any words which, according to their natural import, impute a crime or misdemeanor, which is punishable in the temporal courts by corporal punishment, are actionable in themselves. (Demarest *v.* Haring, 6 Cow. 76.)

"An action will lie for all words spoken of another, which impute to him the commission of a crime involving moral turpitude, and which is punishable by law." Heard on Libel, 25.

[3] Miller *v.* Miller, 8 Johns. 74; Randell *v.* Butler, 7 Barb. 260.

[4] Martin *v.* Stillwell, 15 Johns. 275; Brayne *v.* Cooper, 5 M. &. W. 249; Wright *v.* Paige, 36 Barb. 438; 3 Trans. App. 134.

[5] Young *v.* Miller, 3 Hill, 24; Todd *v.* Rough, 10 S. &. R. 18; Dial *v.* Holter, 6 Ohio (N. S.), 228.

a slave,[1] paying money to secure election as a justice of the peace,[2] opening a letter addressed to another,[3] altering the owner's marks on animals,[4] soliciting one to commit murder,[5] indecent exposure of the person,[6] embracery,[7] making a false declaration of a right to vote,[8] and counterfeiting.[9]

§ 156. In some of the States it seems that all oral language which imputes an indictable offense or an offense punishable at law, is actionable *per se;* thus it is said: "All that is essential to the maintenance of the action for slander is that the words shall impute the commission of a punishable offense."[10] To be actionable the effect of the language must be "to charge some crime or offense punishable by law;"[11] "a charge of crime or some punishable offense,"[12] or "words imputing to another a crime punishable by law,"[13] or an indictable offense.[14] While in other States it is held that words, to be actionable, must

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[1] Smith *v.* Smith, 2 Sneed, 473.

[2] Hoag *v.* Hatch, 23 Conn. 585.

[3] Cheadle *v.* Buell, 6 Ham. 67; *contra*, McCuen *v.* Ludlam, 2 Harr. 12; and see Hillhouse *v.* Peck, 2 Stew. & Port. 395.

[4] Perdue *v.* Burnett, Minor, 138.

[5] Demarest *v.* Haring, 6 Cow. 76.

[6] Torbitt *v.* Clare, 9 Irish Law R. 86.

[7] Gibbs *v.* Dewey, 5 Cow. 503; see *ante*, § 144. subd. *j.*

[8] Crawford *v.* Wilson, 4 Barb. 505.

[9] Howard *v.* Stephenson, 2 Const. Rep., 2d series, 408; Thirman *v.* Matthew, 1 Stew. 384. All words imputing a crime are actionable. (Deford *v.* Miller, 3 Penns. 103). See Arson, Forgery, Larceny, Perjury, Homicide.

[10] McKinney, J., Poe *v.* Grever, 3 Sneed, 666. "Words which impute trespass, assault, battery, and the like, are not actionable *per se*, and yet these offenses are punishable by indictment." (Smith *v.* Smith, 2 Sneed, 478; Dudley *v.* Horn, 21 Ala. 379; Billings *v.* Wing, 7 Verm. 444.) Oral language to be actionable must impute something criminal or that would exclude from society. (Colby *v.* Reynolds, 6 Verm. 489.)

[11] Dunnell *v.* Fiske, 11 Metc. 552.

[12] Edgerley *v.* Swaine, 32 N. Hamp. 481.

[13] Tenney *v.* Clement, 10 N. Hamp. 57; Lukehart *v.* Byerly, 53 Penns. 418.

[14] Kinney *v.* Hosea, 3 Harring. 77.

impute not only an indictable offense, but an indictable offense for which corporal punishment may be inflicted as the immediate penalty.[1]

§ 157. Judging from the language of many English dicta, the rule in England would seem to be that all oral language is actionable *per se*, which imputes a crime or indictable offense. "An action lies for any words which import the charge of a crime for which the party may be indicted."[2] "The test is, whether the crime is indictable or not."[3] "Where an offense of a criminal nature is imputed by the slander for which the party is liable to indictment or punishment by the common or statute law, those words are actionable *per se*."[4] "It is well known that words are not actionable unless they impute some crime or indictable offense."[5] "The words, to be actionable, must impute a criminal offense; that is, the words, if true, must be such that the plaintiff would be guilty of a criminal offense."[6] While other decisions seem to require that an offense must be imputed—which would not only subject the party charged to imprisonment, but to an infamous punishment. To make the words actionable *per se* "there must not only be imprisonment, but an infamous punishment;"[7] and therefore in that case it was

[1] Birch *v.* Benton, 26 Miss. (5 Jones) 153; Billings *v.* Wing, 7 Verm. 144.

[2] Mayne *v.* Digle, Freeman, 46. Words, to be actionable in themselves, must charge some *scandalous* crime; they must be such as to impute to the party an offense for which he may be indicted. (Walmsley *v.* Russell, 6 Mod. 200.) In Smale *v.* Hammon, 1 Bulst. 40, it was said where the words spoken do tend to the infamy, discredit or disgrace of the party, they shall be actionable, but this dictum was said to go too far. (Holt *v.* Scholefield, 6 T. R. 691.) In Scobell *v.* Lee (2 Show. 32), it was held not actionable to call one *regrator*, because *regrating*, although criminal, was not punishable by loss of life or limb. In ancient books we do not meet with the action for words unless the slander concerned life. .Vaughan Ch. J., 2 Vent. 28.

[3] Comyn's Dig. Act. for Defam. F. 20.

[4] 2 Saund. Pl. and Ev. 898, 2d Eng. Ed.

[5] Tyndal Ch. J. Edsall *v.* Russell, 5 Sc. N. R. 815; 2 Dowl. N. S. 648; 4 M. and G. 1099; 12 Law Jour. N. S. C. B. 7.

[6] Alderson, B. Heming *v.* Power, 10 M. and W. 570.

[7] Holt, Ch. J., Turner *v.* Ogden, 2 Salk. 696.

held that the words "Thou art one of those that stole my Lord Shaftesbury's deer" were not actionable *per se*, because, although the offense of deer-stealing was punishable by imprisonment, it was not an *infamous* punishment. "The words [to be actionable] must contain an express imputation of some crime liable to punishment, some capital offense, or other infamous crime or misdemeanor." [1] Mr. Starkie says: "Perhaps it may be inferred generally, that to impute any crime or misdemeanor for which corporal punishment may be inflicted in a temporal court is actionable, without proof of special damage. Where the penalty for an offense is merely pecuniary, an action will not lie for charging such offense; even though in default of payment imprisonment should be prescribed, imprisonment not being the primary and immediate punishment for the offense." [2]

§ 158. It has been supposed that the gist of the action for slander was the peril of prosecution to which a person was exposed by the charge, and therefore that for charging an offense which has been pardoned or atoned for, or which is barred by the statute of limitations, no action can be maintained. Thus it is said, "The ground of the matter being actionable is, that a charge is made which, if it

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[1] De Grey, Ch. J., Onslow *v.* Horne, 3 Wilson, 186. This rule, says Mr. Heard (Heard on Libel, 16), is universally referred to as the correct rule, and was repeated in Holt *v.* Scholefield, 6 T. R. 694, and in Beardsley *v.* Dibblee, 1 Kerr, 258, and adopted in Shaffer *v.* Knitzer, 1 Binney, 542; Andres *v.* Koppenheafer, 3 Serg. & R. 257; Bloom *v.* Bloom, 5 *id.* 392; Pelton *v.* Ward, 3 Caines, 79; Smith *v.* Smith, 2 Sneed, 478; Johnson *v.* Shields, 1 Dutcher, 119.

[2] 1 Starkie on Slander, 43; 6 Mod. 104. This view of the law is adopted in Billings *v.* Wing, 7 Verm. 439; Wagaman *v.* Byers, 17 Md. 183; and in a note at page 90 of Metcalf's edition of Yelverton's Reports; but is questioned 1 Amer. Lead. Cas., 112, 2d ed., and in Smith *v.* Smith, 2 Sneed, 478. Saying that plaintiff went to mass was held actionable, because it was by statute an offense punishable by fine and imprisonment. (Sir Lionel Walden *v.* Mitchell, 2 Vent. 265.) And concealing a felony was held actionable at a time when such an offense was punishable by fine only. (Newlyn *v.* Fasset, Yelv. 154). But the words thou art a common barrator, it was said would not support an action because the punishment was merely fine and binding to good behavior. (Heake *v.* Moulton, Yelv. 90.)

were true, would endanger the plaintiff in point of law."[1] The better opinion is, that the action of slander "is always for the loss of character and not the danger of punishment,"[2] or the hazard of a criminal prosecution.[3] "It is a great slander to be once a criminal; and although a pardon may discharge the punishment,[4] yet the scandal of the offense remains."[5] It is in this view that it has been held actionable, subject to justification on the ground of truth,[6] to say of one, "He was a thief and stole my gold;"[7] or, "He is a returned convict;"[8] or, "He is a convict and has been in the Ohio penitentiary;"[9] or, "You have been cropped for felony;"[10] or, "Thou wast in Launceston gaol for coining and burnt in the hand for it;"[11] or, "Robert Carpenter (the plaintiff) was in Winchester gaol and tried for his life, and would have been hanged had it not been for Leggett, for breaking open the granary of farmer A. and stealing his bacon;"[12] or, "He was whipped

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[1] Parke B., Heming *v.* Power, 10 M. & W. 569. See Hervey *v.* Boies, 1 Penns. 14; Andres *v.* Hoppenheafer, 3 Serg. & R. 258; Dalrymple *v.* Lofton, 1 M'Mullan, 118. "The grounds of action are to be found in the degradation of the party in society, or his liability to criminal animadversion. * * * The party's jeopardy, in a legal point of view, is regarded by the law as the principal ground of action." (1 Starkie on Slander, 18.) But criminal liability is not always the peculiar and exclusive ground of action; instances are to be found of remedy for imputations which could not subject the party to any future penalty. (*Id.* 19.)

[2] Van Ankin *v.* Westfall, 14 Johns. 233; Shipp *v.* McCraw, 3 Murph. 466.

[3] Eastland *v.* Caldwell, 2 Bibb, 24; Smith *v.* Stewart, 5 Barr, 372; Beck *v.* Stitzel, 21 Penn. St. R. 524; Poe *v.* Grever, 3 Sneed, 664.

[4] "In the eye of the law the [pardoned] offender is as innocent as if he had never committed the offense." (*Ex-parte* Garland, 4 Wallace, 380; U. S. *v.* Paddleford, 9 Wallace, 542.) "The pardon makes him a new man, and gives him a new capacity and credit." (2 Hawk. P. C., ch. 57, § 48.)

[6] Boston *v.* Tatham, Cro. Jac. 622, and see Cuddington *v.* Williams, Hobart, 81.

[6] Baum *v.* Clause, 5 Hill, 196; Van Ankin *v.* Westfall, 14 Johns. 233; and see *post*, Defenses.

[7] Boston *v.* Tatham, Cro. Jac. 622.

[8] Fowler *v.* Dowdney, 2 Moo. & Rob. 119; and see the reporter's note to this case

[9] Smith *v.* Stewart, 5 Barr, 372.

[10] Wiley *v.* Campbell, 5 Monr. 396.

[11] Gainford *v.* Tuke, Cro. Jac. 536.

[12] Carpenter *v.* Tarrant, Rep. temp. Hard. 339, cited by L'd Ellenborough, Roberts *v.* Camden, 9 East, 97.

for stealing hogs;"[1] or, "He was put in the roundhouse for stealing ducks at Crowland;"[2] or, "Thou hast been in gaol for stealing a pan."[3] For the words, "Thou wert in gaol for robbing on the highway," the court was divided if actionable or not;[4] a charge of committing a statutable offense was held actionable, although intermediate the speaking the words and the commencement of the action the statute was repealed.[5]

§ 159. Where the offense is charged to have been committed in a foreign state, it will be actionable if it appear that the offense charged is one by the law of that state punishable by indictment, and involving moral turpitude. Where the offense charged is one punishable by indictment at common law it will be presumed to be indictable everywhere; but if the offense charged be one created by statute or punishable by indictment by statute, then, as courts cannot take judicial notice of the statutes of foreign states, to make the charge actionable the statute relating to the offense charged must be pleaded and proved like any other fact.[6] Thus it is actionable *per se*, to charge one with stealing in a foreign state or country,[7] or with mur-

[1] Holley *v.* Burgess, 9 Ala. 728.

[2] Beavor *v.* Hides, 2 Wils. 300.

[3] Showell *v.* Haman, Cro. Jac. 153.

[4] Smale *v.* Hammon, 1 Bulst. 40.

[5] French *v.* Creath, Breese, 12.

[6] Offut *v.* Earlywine, 4 Blackf. 460; Linville *v.* Earlywine, *id.* 469; Langdon *v.* Young, 33 Verm. 136; Stout *v.* Wood, 1 *id.* 71; Barclay *v.* Thompson, 2 Penns. 148; Poe *v.* Greyer, 3 Sneed, 644; Sparrow *v.* Maynard, 8 Jones L. (N. Car.) 195. Burning a barn is an offense by the statutes of Indiana, but not at common law, therefore a charge, "He had to leave Indiana for burning a barn," is not actionable without a *colloquium* of the law of Indiana. (Bundy *v.* Hart, 46 Mo. 460.) Thus the stealing of bank notes not being indictable at common law, to charge a theft of bank notes in South Carolina, was held not to be actionable in North Carolina, unless it was shown that, by the laws of South Carolina, such stealing was subject to an infamous punishment. (Wall *v.* Hoskins, 5 Iredell, 177.) A. and B. being in North Carolina, A. charged B. with stealing a note from him in Virginia, and it appearing that stealing notes was a larceny in Virginia, the charge was held to be actionable. (Shipp *v.* McCraw, 3 Murph. 463.)

[7] As to say in Canada, Old Smith (plaintiff) is a damned thief, he stole a cow in

der,[1] and an action may be maintained for charging a crime committed in another state, which it would not be actionable to charge the commission of in the state in which the action is commenced.[2]

§ 160. "No charge upon a plaintiff, however foul, will be actionable without special damage, unless it be of an offense punishable in a temporal court of *criminal* jurisdiction,"[3] and therefore held not actionable *per se* to

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the States (United States). (Smith *v.* Collins, 3 Up. Can. Q. B. R. 1; and see Johnson *v.* Dicken, 25 Missouri (4 Jones), 580; Cefret *v.* Burch, 1 Sneed, 400.)

[1] Words charging the commission of murder in Ireland are actionable without proving murder to be an indictable offense in that country. (Montgomery *v.* Decley, 3 Wis. 709.) To charge one with administering poison in a foreign country, with intent to kill, is actionable, *semble* the court will presume such an offense to be indictable. See Langdon *v.* Young, 33 Verm. 136.

[2] Van Ankin *v.* Westfall, 14 Johns. 233; and see Stout *v.* Wood, 1 Blackf. 91.

[3] 1 Starkie on Slander, 21, and he proceeds to establish this proposition by referring to the cases in which it has been decided that to say a man is "forsworn," or has "taken a false oath," is not actionable unless the charge connects it with some judicial proceeding. Without this connection he says the charge only imputes a breach of morality, for which no action lies. [See *Perjury, post.*] Besides the older authorities there is cited Hopkins *v.* Beedle, 1 Cai. 347; Stafford *v.* Green, 1 Johns. 505; Ward *v.* Clark, 2 *id.* 10; Watson *v.* Hampton, 2 Bibb's R. 319; Jacobs *v.* Fylee, 3 Hill, 572. To these we add Hopwood *v.* Thorn, 8 C. B. 293; Brite *v.* Gill, 2 Monr. 65; Dorsey *v.* Whipps, 8 Gill, 457; Holt *v.* Scholefield, 6 T. R. 694; Wyant *v.* Smith, 5 Blackf. 293; Tebbetts *v.* Goding, 9 Gray, 254; Edgerley *v.* Swain, 32 N. H. 478; Wright *v.* Lindsay, 20 Ala. 428; Barham *v.* Nethersall, Yelv. 21; and see Heard on Libel, § 28. A charge of having "broken open and read a letter" sent by mail, held not actionable, because the offense, although indictable, is not, morally speaking, a crime. (Hillhouse *v.* Peck, 2 Stew. & Port. 395; and see McCuen *v.* Ladlum, 2 Harr. 12; Cheadle *v.* Buell, 6 Ham. 67; *post*, note to § 178, and *ante*, p. 208, note 3.

Where the words on their face charge a criminal offense, but are shown by their context or otherwise, not to have that meaning, they are not actionable; thus the words, they are highwaymen, robbers, and murderers, being shown to relate to a transaction not amounting to a criminal offense, were held not to be actionable. (Van Rensselaer *v.* Dole, 1 Johns. Cas. 279.) And see § 134 and note to § 137, *ante.*

It has been held that a charge by a married woman of having stolen her goods, is not actionable [she having no separate estate], as a married woman could not have goods of her own. (1 Rolle Abr. 74; 6 Bac. Abr. 238; 1 Starkie on Slander, 77.) But where a married woman said, my turkeys are stolen, Charnell hath stolen them, it was held Charnell might have his action. (Charnell's Case, Cro. Eliz. 279.) And so where a married woman said, thou hast stolen my faggots. (Stamp *v.* White, Palmer, 358; and see Fowell *v.* Plunkett, Cro. Car. 52.)

By the statutes of Illinois, no child under the age of ten years can be punished for larceny; but an action may be maintained by such child for slanderous words

charge a breach of trust,[1] or a malicious trespass,[2] or of burning, destroying, and suppressing a will,[3] or attempting to procure, or causing or procuring a miscarriage,[4] or with incest,[5] or adultery,[6] or crime against nature,[7] or with cheating,[8] or "mismarking" cattle,[9] or living by imposture.[10]

§ 161. A purpose or intent to do an unlawful act, without any act being done, is not punishable criminally, and therefore within the rule stated in the last preceding section (§ 160), it is not actionable orally to charge one with a mere intent to commit an offense,[11] "and this rule seems in all times to have been adhered to with more consistency than is generally observable in decisions relating to slander."[12] Thus it has been held not actionable to say

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accusing her of theft. (Stewart *v.* Howe, 17 Ill. 71; and see Redway *v.* Gray, 31 Verm. (2 Shaw) 292; Dukes *v.* Clark, 2 Blackf. 20; Bash *v.* Somers, 20 Penns. (8 Harris) 159. See notes pp. 173, 174, and note 10, p. 195, and § 144, subd. bb. *ante.*

[1] McClurg *v.* Ross, 5 Binn. 218.

[2] Wilcox *v.* Edwards, 5 Blackf. 183.

[3] O'Hanlon *v.* Myers, 10 Rich. Law (S. Car.), 128; and see 3 Salk. 327.

[4] Not within the exceptions of the statute (Bissell *v.* Cornell, 24 Wend. 354; Abrams *v.* Foshee, 3 Clarke, 274; Smith *v.* Gafford, 31 Ala. 45), and held not actionable to charge an attempt to commit a robbery. (Russell *v.* Wilson, 7 B. Monr. 261.)

[5] Eure *v.* Odom, 2 Hawks, 52; and as to charge of incest, see Starr *v.* Gardner, 6 Up. Can. Q. B. Rep. O. S. 512; Watts *v.* Greenlee, 2 Dev. 115; Gallwey *v.* Marshall, 9 Exch. 294, *ante,* § 141.

[6] Wagaman *v.* Byers, 17 Md. 183; Castlebury *v.* Kelly, 26 Geo. 606; see *ante,* § 144, subd. *a.*, and *post.*

[7] Coburn *v.* Harwood, Minor, 93; Estes *v.* Carter, 10 Iowa, 400; see *ante,* §§ 144, 153, and *post.* Where the crime against nature is indictable, to charge the commission of it is actionable. (Goodrich *v.* Woolcot, 3 Cow. 231; 5 Cow. 714.)

[8] Odiorne *v.* Bacon, 6 Cush. 185; Richardson *v.* Allen, 2 Chit. 657; Wierback *v.* Trone, 2 Watts & Ser. 408. Thou hast cheated me of several pounds, held actionable. (Surman *v.* Shilletto, 3 Burr. 1688.)

[9] Williams *v.* Karnes, 4 Humph. 9; Johnson *v.* Morrow, 9 Port. 525.

[10] Wilby *v.* Elston, 18 Law Jour. 320, C. P.; 13 Jur. 706; 7 Dowl. & L. 143; 8 C. B. 142.

[11] McKee *v.* Ingalls, 4 Scam. 30; Seaton *v.* Cordray, Wright, 101; Harrison *v.* Stratton, 4 Esp. 218; Wilson *v.* Tatum, 8 Jones L. (N. Car.) 300.

[12] 1 Starkie on Slander, 23.

of one, Thou hast procured J. S. to come thirty miles to commit perjury against his father * * * and hast given him £10 for his pains; or, Harris hath procured and *suborned* one Smith to come thirty miles to commit perjury against his father * * * and given Smith £10 for that purpose;[1] or, Thou wouldst have killed me,[2] or, She would have cut her husband's throat;[3] or, Thou wouldst have taken my purse from me on the highway;[4] or, Thou wouldst have murdered me;[5] or, Sir Harbert Crofts keepeth men to rob me;[6] but for the words, He sent his man A. to kill me, the court was divided if actionable or not;[7] and the words, He will lie in wait to rob J. S. within two days, were held actionable.[8] So were the words, "You may well spend money at law, for you can coin money out of half pence and farthings," because the words implied an act, for by a *mere power* the plaintiff could never be able to spend money at law.[9] From the fact that in England a mere intent may constitute the crime of treason, a charge of treasonable intention has there been held to be actionable; thus, for saying, "he is a Jacobite, and for bringing in the Prince of Wales and popery to the destroying of our nation," held an action could be maintained.[10]

§ 162. It has been said the cases are uniform on the

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[1] Harris *v.* Dixon, Cro. Jac. 158; Yelv. 72.

[2] Potts' Case, Vin. Abr. Act. for Words, Q. *a.* 8; cited as Dr. Poe's Case, 2 Bulst. 206.

[3] Scott *v.* Hillers, Lane, 98; but it being added, and did attempt it, the latter words were held actionable.

[4] Godb. 202.

[5] Tettal *v.* Osborne, cited in Storrer *v.* Audley, Cro. Eliz. 250. He *sought* to murder me, held actionable, because *sought* implies more than a mere intent. (Cro. Eliz. 308.)

[6] Crofts *v.* Brown, 3 Bulst. 167.

[7] Bray *v.* Andrews, Moore, 63; Dal. 66.

[8] Sidman *v.* Mayo, 3 Bulst. 261.

[9] Horne *v.* Powell, Salk. 697.

[10] Prinn *v.* Howe, 1 Bro. Parl. Cas. 64; and see Eaton *v.* Allen, 4 Co. 16.

point that for an imputation of evil *inclinations* or *principles* no action lies, unless it affects the plaintiff in some particular character, or produces special damage.[1] But unless by *inclinations* and *principles* are meant *intentions* (§ 161), or the assertion be limited to oral language, the dictum seems to be unwarranted. It was held actionable to publish in writing that plaintiff had openly avowed the opinion that government had no more right to provide by law for the support of the worship of the Supreme Being than for the support of the worship of the Devil;[2] or that plaintiff would put his name to anything that T. would request him to sign, that would prejudice D.'s character;[3] and the words, "He would rob the mail for one hundred dollars." spoken of a postmaster, were held actionable.[4]

§ 163. It is held, in some cases, that words which denote *the opinion* or *the suspicion* entertained by the publisher, are not equivalent to a direct charge, and therefore are not actionable;[5] thus, where the words were, "I have a suspicion that you, B., have robbed my house, and therefore I take you into custody," it was held the judge rightly directed the jury that if they believed the defendant meant to impute only a suspicion of felony, and not an absolute charge of felony, their verdict must be for the defendant.[6] The words "she ought to have been trans-

[1] 1 Starkie on Slander, 24; Harrison *v.* Stratton, 4 Esp. 218.

[2] Stow *v.* Converse, 3 Conn. 325.

[3] Duncan *v.* Brown, 15 B. Monr. 186.

[4] Craig *v.* Brown, 5 Blackf. 44.

[5] Words which denote opinion or suspicion are not actionable. (Comyn's Dig. Act. for Defam. F. 13; cited in Hodgson *v.* Scarlett, 1 B. & Ald. 233.) "What is the difference between suspicion and belief? Suspicion may rest on no grounds, belief rests upon some grounds." (Byles, J., Leete *v.* Hart, Law Rep. III. C. P. 824.)

[6] Tozer *v.* Mashford, 4 Eng. L. & Eq. R. 451; 6 Exch. 539; 20 Law Jour. Rep. (N. S.) Ex. 224. The words, "I will take him to Bow street (a police court so called) on a charge of forgery," held not actionable, as not amounting to a charge of felony. (Harrison *v.* King, 4 Price, 46; 7 Taunt. 431.)

ported," were held not actionable because they expressed only *the opinion* of the speaker.[1] But the words, He ought to be hanged as much as A., who was in fact hanged, were construed to charge an offense which deserved hanging, and actionable;[2] and it was held actionable to say of one, if you had your deserts you had been hanged before now;[3] and so of the words, He hath deserved his ears to be nailed to the pillory,[4] but not actionable to say: Thou deservest to be hanged;[5] or, Thou shouldst have sat on the pillory if thou hadst thy deserts;[6] or, Thou hast done that for which thou deservest to be hanged.[7] But the words, You have done things with the company for which you ought to be hanged, and I will have you hanged before the first of August, were held actionable;[8] and so of the words, "I know enough he has done to send him to the penitentiary."[9] It was held not to be actionable to say of one, "He is a great rogue, and deserves to be hanged as well as Gale," who was condemned to be hanged. Because the words show opinion merely, and perhaps the speaker might not think Gale deserved hanging.[10] It was held not actionable to say, I will take him to Bow street (a police office so called) on

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[1] Hancock *v.* Winter, 7 Taunt. 205. The words, I will transport him for felony, were held actionable. (Tempest *v.* Chambers, 1 Stark. Cas. 67.)

[2] Read *v.* Ambridge, 6 Car. & P. 308; and see Davis *v.* Noak, 1 Stark. Cas. 372.

[3] Down's Case, Cro. Eliz. 62.

[4] Jenkinson *v.* Mayne, Cro. Eliz. 384.

[5] Heake *v.* Moulton, Yelv. 90.

[6] Anon., Moore, 243.

[7] Fisher *v.* Atkinson, Vin. Abr. Act. for Words, G. *a.* 5.

[8] On the ground that they imputed the commission of a crime punishable by hanging (Francis *v.* Roose, 3 M. & W. 191). "I will have him transported for perjury and forgery," with special damage held actionable. (Floyd *v.* Jones, 2 Barnard. 101.)

[9] Johnson *v.* Shields, 1 Dutcher, 116. A general charge of having been guilty of crime without naming the particular crime, seems sufficient (Curtis *v.* Curtis, 4 Moo. & S. 337); but held not sufficient to say he had been guilty of conduct unfit for publication. (James *v.* Brook, 10 Jur. 541.)

[10] Bush *v.* Smith, 2 Jones, 157.

a charge of forgery.[1] It was held actionable for one to say he supposed the plaintiff was guilty of a crime;[2] or, I *think* he is a horse stealer.[3] It seems no more than the expression of an opinion to say, "Two dyers have gone off, and for aught I know Harrison will be so too within this time twelve month." Yet these words were held to be actionable;[4] so of the words, "All is not well with Daniel Vivian; there are many merchants who have lately failed, and I expect no otherwise of Daniel Vivian";[5] and so of the words, "I am thoroughly convinced you are guilty of the death of D. D."[6] But held not actionable to express a supposition or belief that one went to a certain place for the purpose of persuading another to commit adultery with him.[7]

§ 164. One may charge another with the commission of an offense as well by way of a question as by a direct assertion,[8] as, Is H. the man who broke jail?[9] what art thou? a bankrupt;[10] when will you bring home the nine stolen sheep you stole from I. S.?[11] have you brought the

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[1] Harrison *v.* King, 4 Price, 46; 7 Taunt. 431.

[2] Dickey *v.* Andrews, 32 Verm. 55.

[3] Stitch *v.* Wisedome, Cro. Eliz. 348.

[4] Harrison *v.* Thornborough, 10 Mod. 11.

[5] Vivian's Case, 3 Salk. 326.

[6] Peake *v.* Oldham, Cowper, 275; 2 W. Black. 960.

[7] Dickey *v.* Andrews, 32 Verm. 55, and as to a charge of inciting one to commit a crime (see Passie *v.* Mondford, Cro. Eliz. 747; Lady Cockaine's Case, Cro. Eliz. 49; Eaton *v.* Allen, 4 Co. 16.) The dicta and decisions that words denoting *opinion* are not actionable, must have their origin in the *supposed* distinction between matters of fact and matters of opinion. See this distinction discussed in a case of misrepresentation, Haight *v.* Hoyt, 19 N. Y. 468, in an Essay on the influence of authority in matters of opinion, by George Cornewall Lewis, and in the review of that work—Edinburgh Review, April, 1850; also in Whateley's Logic; and see the distinction noticed, Root *v.* King, 7 Cow. 629; Reg. *v.* Ardley, Law Rep. I. Cro. Cas. Res. 304.

[8] Gorham *v.* Ives, 2 Wend. 534; Sawyer *v.* Eifert, 2 Nev. & M. 511.

[9] Hotchkiss *v.* Oliphant, 2 Hill, 510.

[10] Jordan *v.* Lyster, Cro. Eliz. 273, pl. 1.

[11] Hunt *v.* Thimblethorp, Moore, 418.

£40 you stole?[1] wilt thou murder my sister as thou didst thy wife?[2] who stole the bell-ropes?[3] Asking as to a forgery, whether the witness did not think it was in G.'s handwriting, and asserting that he had shown it to some persons who said it was in G.'s handwriting, would seem to show an intent to impress a belief of G.'s guilt of the forgery.[4]

§ 165. In some of the older cases it was held that "adjective words," or "words spoken adjectively," do not confer a right of action. But, as was well said by Lord Coke, "sometimes adjectives will maintain an action and sometimes not."[5] Thus it was held not actionable to call one "conjuring knave,"[6] or "murderous villain,"[7] or "pocky whore,"[8] or "rebellious knave;"[9] but held actionable to call one a "traitorous knave,"[10] or a "traitor knave."[11] We conceive the true rule to be, that when the word imputes an act it is actionable, and when it imputes an intention or inclination only it is not actionable.[12] Thus it has been held not actionable to call one a "thievish knave," or to say to one "thou hast thievishly taken my money," because the word *thievish* or *thievishly* implies an inclination only;[13] but to call one a thieving

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[1] Mayott *v.* Gibbons, 2 Rolle R. 166.

[2] Brown *v.* Charlton, Keb. 359, pl. 52.

[3] Jackson *v.* Adams, 2 Scott, 599; 2 Bing. N. C. 402. The words in this case were held not actionable. See in note p. 173, *ante*.

[4] Gorham *v.* Ives, 2 Wend. 534.

[5] 4 Coke, 19.

[6] Killick *v.* Barns, 2 Bulst. 138.

[7] Ld. Raym. 236. So "murderous quean" held not actionable. (Vin. Abr., Act. for Words, I. *a.* 4.)

[8] Gulford's Case, 2 Rolle R. 71; and "pocky rascal," see Vin. Abr., Act. for Words, G. *b.* 5.

[9] Ward *v.* Thorne, Cro. Eliz. 171; Booth *v.* Leach, Lev. 90.

[10] *Id.*

[11] Selby *v.* Carryer, 2 Bulst. 210.

[12] 1 Starkie on Slander, 71, and § 162, *ante*.

[13] Vin. Abr., Act. for Words, I. *a.* 4, 11; Robins *v.* Hildredon, Cro. Jac. 65.

rogue was held actionable because *thieving* implies an act.[1] "Thieving puppy" was held actionable,[2] and so were "thievish pirate,"[3] "bankrupt knave," "pocky knave,"[4] and "bankrupt skrub."[5] "Bankrupt rogue" was held not actionable when spoken of an individual as such;[6] but those words, when spoken of one in trade (a shoemaker), were held actionable.[7] "Bankruptly knave" was said not to be actionable because the phrase implies only bankrupt-like knave.[8] And so "Cuckoldy rogue" was held actionable.[9] A participle, it is said, implies an act done, and therefore held actionable to call one a "murdering rogue,"[10] or a "buggering rogue,"[11] or to say he is robbing or ravishing.[12]

§ 166. Words charging a burning amounting to *arson*, whether at common law or by statute, are actionable;[13]

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[1] Hunt *v.* Merrychurch, 2 Keb. 440; Dorrell *v.* Grove, Freem. 279.

[2] Little *v.* Barlow, 26 Geo. 423; Pierson *v.* Stiortz, 1 Morris, 136, and see *post*, § 169.

[3] Vin. Abr., Act. for Words, I. *a.* 12.

[4] Inglebath *v.* Jones, Cro. Eliz. 99; but it was doubted in Robinson *v.* Mellor, Cro. Eliz. 843, if "bankrupt knave" was actionable, and the phrase was held not actionable when spoken of a tanner. (York *v.* Cecil, Browl. 16.) The words "base, beggarly, bankrupt knave" were held actionable in Still *v.* Finch, Cro. Car. 381; and so of the words bribing knave spoken of an attorney. (Yardley *v.* Ellis, Hob. 8.)

[5] Wilson *v.* Crow, Sty. 75.

[6] Loyd *v.* Pearse, Cro. Jac. 424.

[7] Langley *v.* Colson, Godb. 151.

[8] Selby *v.* Carrier, Cro. Jac. 345; but said otherwise, Booth *v.* Leach, Lev. 90. See Vin. Abr., Act. for Words, I. *a.* 3.

[9] The words were spoken in London, and held actionable as implying his wife was a whore. 1 Str. 471.

[10] Green *v.* Lincoln, Cro. Car. 318.

[11] Collier *v.* Bourn, 2 Keb. 377; or "perjured knave," (Staverton *v.* Relfe, Yelv. 160;) or "perjured rogue" (Orton *v.* Fuller, Lev, 65); but where the word swere, Thou art a perjured knave, that is to be proved by a stake that parts the lands of J. S. and J. D., it was doubted if they were actionable. (Brecheley *v.* Atkins, Yelv. 10.)

[12] Sybthorp's Case, 1 Rolle Abr. 176; 1 Starkie on Slander, 72.

[13] Brady *v.* Wilson, 4 Hawks, 93: Case *v.* Buckley, 15 Wend. 327; Jones *v.* Hungerford, 4 Gill & Johns. 402; House *v.* House, 5 Har. and Johns. 124; Wallace *v.* Young, 5 B. Monr. 155. Saying, He [plaintiff] has been at different times close about

but charging one with burning his own store,[1] or the barn of another, is not actionable.[2] But to charge one with burning his own store to defraud the insurers would be actionable.[3]

§ 167. A general charge of *forgery* made orally is actionable;[4] and so to charge, "You are a rogue, for you forged my name,"[5] or "you signed my name without my permission."[6] But held not actionable to say, "Thou hast forged my hand," or "thou are a forger."[7] The writing charged to have been forged must it seems be one which if genuine would operate as the foundation of another's liability.[8] It has been held actionable to charge the forgery of a deposition,[9] a warrant,[10] a petition to the legis-

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where C.'s gin-house was burned, in disguise, held not to amount to a charge of arson, and not actionable. (Waters *v.* Jones, 3 Port. 442.) See *ante*, § 144, subd. *c*.

[1] Bloss *v.* Tobey, 2 Pick. 310; McNab *v.* McGrath, 5 Up. Can. Q. B. Rep. O. S. 516; or a building belonging to the wife of plaintiff, but occupied by plaintiff. (Redway *v.* Gray, 31 Verm. 292.)

[2] Barham *v.* Nethersall, Yelv. 21; Bundy *v.* Hart, 46 Mo. 460; charging one with burning a school-house was held actionable (Wallace *v.* Young, 5 B. Monr. 155); and so of a gin-house. (Waters *v.* Jones. 3 Port. 442.)

[3] 1 Am. Lead. Cas. 117, 3d ed.; and see Tebbets *v.* Gouling, 9 Gray, 254; Bretton *v.* Anthony, 103 Mass. 37; *contra*, Redway *v.* Gray, 31 Verm. 292.

[4] Alexander *v.* Alexander, 9 Wend. 141; Andrews *v.* Woodmansee, 15 Wend. 232; Nicolls *v.* Hayes, 13 Conn. 155; Arnold *v.* Cost, 3 Gill & Johns. 219. Thou hast forged a *deed* or bond actionable, but thou hast forged a writing not actionable (Motley *v.* Slany, Keb. 273; Austie *v.* Mason. Cro. Eliz. 554; Reynell *v.* Sackfield, 2 Bulst. 132; Aier *v.* Frost, Rolle R. 431; S. C. Frost *v.* Ayer, 3 Bulst. 265; Andrews *v.* Bird, Het. 31), unless with an innuendo, a deed. (Anon. Sid. 16; and see Goodale *v.* Castle, Cro. Eliz. 554.) You have falsely forged your father's hand, and thereby falsely have procured your father's tenants to pay rents to you which were due to your sister, held not actionable. (Venard *v.* Woton, Cro. Eliz. 166.) See *ante*, § 144, subd. *k*.

[5] Jones *v.* Hearne, 2 Wils. 87.

[6] Creelman *v.* Marks, 7 Blackf. 281.

[7] Vin. Abr., Act. for Words, G. *a*. 20.

[8] Jackson *v.* Weisiger, 2 B. Monr. 214. You say you were authorized by P. to draw bills on him. You never were authorized; if you have any letters from him they are forged. These words held not actionable. Mills *v.* Taylor, 3 Bibb, 469.

[9] Atkinson *v.* Reding, 5 Blackf. 39; or forging writs. (Hungerford *v.* Watts, 4 Lev. 181; Sale *v.* Marsh, Cro. Eliz. 178; *contra*, Halley *v.* Stanton, Cro. Car. 268.)

[10] Stone *v.* Smalcombe, Cro. Jac. 648; Thomas *v.* Axworth, Hob. 2.

lature for a grant of land;[1] and so of a letter containing these words, "I have to inform you I have received your money, and want you to come and receive it."[2]

§ 168. A general charge of being a murderer,[3] or of having killed another, is actionable.[4] Thus held actionable to say "thou hast killed a man;"[5] "you killed my brother;"[6] "you killed one negro and nearly killed another;"[7] "George Button is the man who killed my husband;"[8] "I will call him in question for poisoning his own aunt, and make no doubt but to prove he hath poisoned his aunt;"[9] and the words "he killed my child; it was the saline injection that did it," with an innuendo that it was meant to charge the plaintiff with feloniously

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[1] Alexander *v.* Alexander, 9 Wend. 14.

[2] Ricks *v.* Cooper, 3 Hawks, 587. See § 144, subd. *k*, *ante*.

[3] Dudley *v.* Robinson, 2 Iredell, 141; Vin. Abr., Act. for Words, G. *a.* 11, *ante*, § 144, subd. *m. s.*; but the words, Thou art a murderer and a bloody fellow, and I am afraid of you, were held not actionable. (*Id.* 25.) To call one murderer because he murdered a dog, not actionable; *dictum*, Waggoner *v.* Richmond, Wright, 173; see note p. 160, and note 2, p. 184, *ante;* and the words "They are highwaymen, robbers, and murderers," appearing to be spoken in reference to a transaction not involving robbery or murder, were held not actionable. (Van Rensselaer *v.* Dole, 1 Johns. Cas. 279.)

[4] Johnson *v.* Robertson, 4 Port. 486; Chandler *v.* Holloway, *id.* 18. It need not be alleged the party charged to have been killed is in fact dead. (Carroll *v.* White, 33 Barb. 618; see *an'e*, notes 1, p. 174 and 3, p. 214, and § 144, subd. *m. s.*)

[5] Cooper *v.* Smith, Cro. Jac. 423; Banfield *v.* Lincoln, Freem. 278.

[6] Taylor *v.* Casey, Minor, 258. Thou art a rogue and rascal, and hast killed thy wife, held actionable. (Wilner *v.* Hold. Cro. Car. 489.)

[7] Hays *v.* Hays, 1 Hump. 402.

[8] Button *v.* Hayward, 8 Mod. 24. Held actionable to say, Thou didst poison thy husband (Gardiner *v.* Spurdance, Cro. Jac. 438;) or, T (plaintiff) killed thy husband (Toose Case, Cro. Jac. 306); or, Thou hast killed a man (Godfrey *v.* More, Cro. Eliz. 317); or, Thou hast killed my wife (Talbot's Case, Cro. Eliz. 823); or, Thou hast killed thy wife (Wilner *v.* Hold, Cro. Car. 489).

[9] Webb *v.* Poore, Cro. Eliz. 569. See *ante*, § 144, subd. *x*. Not actionable to say, "It could be proved by many violent presumptions that he (plaintiff) was the death of P." (Weblin *v.* Meyer, Yelv. 153); or, "I doubt not but to see thee hanged for killing Mr. Sydman's man who was murdered." (*Anon.* Jenk. 302.) It was held actionable to say, "Thou hast murdered A. thy late servant." If A. is not dead, or if there were no such person, the scandal is the greater (Green *v.* Warner, 3 Keb. 624); or, Thou didst kill thy master's cook. (Cooper *v.* Smith, Cro. Jac. 423; and see Barons *v.* Ball, *id.* 331.)

killing a child by improperly and with gross negligence and culpable want of caution administering the injection."[1]

§ 169. A general charge of being a thief[2] is actionable, as to call one "a hog thief,"[3] "a bloody thief."[4] It is actionable to say of one he is "a thieving person, he stole and ran away;"[5] or "he is a thief, he stole my wheat and ground it and sold the flour to the Indians;"[6] or "you are a thief, you have robbed me of my bricks."[7] The charge is not the less actionable because made indirectly.[8] Thus it was held actionable to say "tell him (plaintiff) he is riding a stolen horse, and has a stolen watch in his pocket;"[9] or, "I saw him take corn from A.'s crib twice, and look round to see if any person saw him measuring;"[10] or, "You get your living by sneaking about when other people are asleep. What did you do with the sheep you killed? Did you eat it? It was like the beef you got the negroes to bring you at night. Where did you get the

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[1] Edsall *v.* Russell, 5 Scott N. R. 891; 2 Dowl. N. S. 614. 4 Man. & G. 1090; and see Carroll *v.* White, 33 Barb. 615, and *ante*, § 144. The words "That rogue Davies, the apothecary, hath poisoned my uncle; I will have him digged up again, and hang him," held actionable. Davies *v.* Okeham, Sty. 245.

[2] Dudley *v.* Robinson, 2 Iredell. 141; and see *ante*, note 2, p. 221; or of having been a thief, *ante*, note 7, p. 209; and see § 144, subd. p. r. z. *bb. dd. ee.*

[3] Hogg *v.* Wilson, 1 N. & M. (So. Car.), 216.

[4] Fisher *v.* Rottereau, 2 McCord, 189.

[5] Alley *v.* Neely, 5 Blackf. 200; and see *ante*, note 2, p. 221.

[6] Parker *v.* Lewis, 2 Greene (Iowa), 311.

[7] Sloman *v.* Dutton, 10 Bing. 402; 4 M. & Sc. 174. Ayres is a thief and hath stolen my apple trees, actionable. Ayres' Case, 2 Brownl. 280.

[8] McKennon *v.* Greer, 2 Watts, 352; Mayson *v.* Sheppard, 12 Rich. Law (So. Car.), 254. I believe he will steal, and I believe he did steal, amount to a charge of larceny. (Dottarer *v.* Bushey, 16 Penn. St. R. 204; and *ante*, § 144, subd. *bb.*) The wife of B, was asked by C, wherefore will your husband hang S. She answered, for breaking our house in the night and stealing our goods, held actionable although spoken in answer to a question. (Hayward *v.* Naylor, 1 Rolle Abr. 50.) So publishing in writing that certain property had been stolen, and the thief was believed to be plaintiff, held actionable. (Simmons *v.* Holster, 13 Min. 249.)

[9] Davis *v.* Johnston, 2 Bailey, 579.

[10] Jones *v.* McDowell, 4 Bibb, 188.

little wild shoats you always have in your pen? You are an infernal roguish rascal;"[1] or, "There is the man who stole my horse and fetched him home this morning."[2] A charge by one partner against his copartner o f "pilfering" out of the store, held actionable;[3] and held actionable to say of one "he *took* my wood, and is guilty of any and everything that is dishonest;"[4] or, "he robbed the United States mail;"[5] and it is actionable to charge one having the custody of goods with stealing them;[6] but held not actionable to charge a weaver with stealing filling sent to his house to be woven into cloth.[7]

§ 170. A charge of larceny, that is, the taking *animo furandi* the personal property of another, the subject of of larceny, is actionable;[8] thus the words, "You have stolen my belt,"[9] or "my boards,"[10] or "my tea,"[11] were held actionable. And so of the words "You robbed me, for I found the thing you done it with;"[12] or, "You

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[1] Morgan *v.* Livingston, 2 Rich. 573.

[2] Bonner *v.* Boyd, 3 Har. & J. 278.

[3] Beckett *v.* Sterrett, 4 Blackf. 499. Actionable to say, She is as very a thief or a worse thief than any that robbeth by the highway. (Ratcliffe *v.* Shubley, Cro. Eliz. 224.)

[4] Dottarer *v.* Bushey, 16 Penn. St. Rep. 204.

[5] Jones *v.* Chapman, 5 Blackf. 88.

[6] Gill *v.* Bright, 6 B. Monr. 130.

[7] Hawn *v.* Smith, 4 B. Monr. 385; but see *ante*, in note, p. 173, and § 144. To charge one with stealing cotton held actionable, although the charge was made in allusion to cotton which the plaintiff had to gin for the defendant's brother (Stokes *v.* Stuckey, 1 M'Cord, 562); and as an overseer of an estate may be guilty of stealing the goods of his employer entrusted to him, it was held actionable to charge an overseer with stealing corn of his employer. (Wheatley *v.* Wallis, 3 Har. & J. 1.)

[8] Galloway *v.* Courtney, 10 Richard. 414; Blanchard *v.* Fisk, 2 N. H. 398; Bonner *v.* Boyd, 3 Har. & Johns. 278; Wheatley *v.* Wallace, 3 *id.* 1; Stokes *v.* Stuckey, 1 M'Cord, 562; Gill *v.* Bright, 6 B. Monroe, 130; Gaul *v.* Fleming, 10 Ind. 253; and see *ante*, § 144, subd. p. z. *bb. dd. ee.* and note 3, p. 214. A charge of taking clothes *animo furandi* from a dead body, held actionable. (Wenson *v.* Sayward, 13 Pick. 402.)

[9] St. Martin *v.* Desnoyer, 1 Min. 156; and so of the words, Thou hast stolen my goods, and I will have thy neck. (Fleming *v.* Jales, 2 Browal. 230.)

[10] Burbank *v.* Horn, 39 Maine (4 Heath), 232.

[11] Coleman *v.* Playstead, 36 Barb. 26.

[12] Rowcliffe *v.* Edmonds, 7 M. & W. 12.

robbed W.;"[1] but the words "He robbed the treasury and bought a farm with it,[2] or "Bear witness he hath stolen my cloth," held not actionable.[3] Charging plaintiff with having stolen a barrel of pork may or may not be actionable, according to the circumstances of the publication;[4] but *semble* to render them non-actionable it must appear that the facts could not in any view amount to a felony.[5] Where the words were "I have lost a calf-skin out of my cellar. * * * There was no one in the cellar but you, Bornman and Gray. I do not blame you nor Gray, but Bornman must have taken it," they were held actionable.[6] Charging one with stealing a key out of the lock of a door, held actionable.[7] By the laws of

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[1] Tomlinson *v.* Brittlebank, 1 Nev. & M. 455; 4 B. & Adol. 630. Thou hast robbed the church, and thou hast stolen the lead off from the church, held actionable. (Benson *v.* Morley, Cro. Jac. 153.) And so of the words: He hath robbed the church. (Sibthorpe's Case, Jones, 366.)

[2] Allen *v.* Hillman, 12 Pick. 101, and see in § 144, subd. *z*.

[3] Bury *v.* Wright, Yelv. 126.

[4] Phillips *v.* Barber, 7 Wend. 439; and see § 144. You (plaintiff) have stolen a file of bills out of my desk, with an innuendo that by file of bills was intended a file of unsatisfied accounts, held not actionable. (Blanchard *v.* Fisk, 2 N. Hamp. 398.)

[5] Laurie *v.* Wells, 7 Wend. 175; Alexander *v.* Alexander, 9 *id.* 141; Case *v.* Buckley, 15 *id.* 327. B. spoke of A., that A. and B. and one C. sat down to gamble in a house in D., and while there, C. took from his pocket-book a five dollar bill and proposed to bet one dollar; that after the bill was put down on a chance it was missing, and search was made for it but it could not be found, whereupon the parties agreed to submit to a search, which was made but the bill was not found; that after this search, all the parties went out of the house to search for the missing bill; near the window they found a pocket-book with the clasp unfastened, and in it was the missing bill; that C. took out the bill and handed the pocket-book to A., who took it, and then said, "Boys, don't tell this on me, for if you do it will ruin me." Held that these words did not of themselves import a charge of larceny. (Prichard *v.* Lloyd, 2 Carter, 154.)

[6] Bornman *v.* Boyer, 3 Binn. 515; *ante*, § 144, subd. *dd*.

[7] Hoskins *v.* Tarrence, 5 Blackf. 417, this decision was on the hypothesis that stealing a key out of the lock of a door is larceny. It was so held in Rex *v.* Hedges, 1 Leach C. C. 201, 4 ed., but is said to be "clearly wrong." Heard on Libel, p. 37, note 4. Actionable to say: You never thought well of me since G. [plaintiff] did steal my lamb (Grave's Case, Cro. Eliz. 289); or, I dealt not so unkindly by you [plaintiff] when you stole a sack of corn. (Cooper *v.* Hakewell, 2 Mod. 58.) J W. [plaintiff] was in question for stealing a mare, and hue and cry went out after him, and he durst not show his face hereabouts, doubtful if actionable. (Gray *v.* Wayle,

Pennsylvania taking and carrying away fruits, vegetables, &c., whether attached to the soil or not, is a misdemeanor, yet where the words were "Mrs. Reynolds has stolen corn out of Gubbles' field," "he was confident, Pat. Reynolds' wife stole Gubbles' corn," held the words were not actionable, if they referred to growing corn.[1] "He sheared two of Zack. Austin's sheep," "He sheared two of Zack. Austin's sheep and kept the wool," with an innuendo that a larceny was intended, but without any *colloquium* held not actionable.[2] An action will not lie, without allegation of special damage for the words, "you had a share in breaking into the store," alleged to refer to a robbery of a store belonging to the plaintiff and defendant as co-partners.[3]

§ 171. A direct charge of perjury is actionable *per se*,[4] and it is actionable to say of one, "The Reverend

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Sty. 159.) A. said to B. [the defendant]. My sheep were feloniously stolen away; B. replied, I know who *took* them—it was J. S.; held actionable. (Helly *v.* Hender, 3 Bulst. 83.) Go follow suit against W. [the plaintiff] for stealing thy two kine, and hang him—held actionable. (Willymote *v.* Welton, Cro. Eliz. 904.) So were the words, "He is infected of the robbery and murder lately committed, and doth smell of the murder." (Hawley *v.* Sidenham, Vin. Abr. Act. for Words, P. *a.* 14.) You might have known your own sheep and not have stolen mine, court divided if actionable or not. (Thompson *v.* Knott, Yelv. 144.) Thou [plaintiff] hast stole my mare or was consenting to it, held not actionable; the plaintiff might consent and yet be faultless, and the latter part of the sentence controlled the first. (Anon., Noy, 172.) S. [plaintiff] did steal a mare, or else G. is forsworn, not actionable, not being a a direct charge of stealing. (Sparkham *v.* Pye, Cro. Jac. 532.) So the words "you as good as stole the canoe of J. H.," were held not actionable *per se* (Stokes *v.* Arey, 8 Jones L. (N. Car.) 66.

[1] Stitzell *v.* Reynolds, 9 P. F. Smith, 488.

[2] Brown *v.* Piner, 6 Ky. (Bush), 596.

[3] Acfele *v.* Wright, 17 Ohio, 238.

[4] Newbit *v.* Statuck, 35 Maine (5 Red.), 315; Bell *v.* Farnsworth, 11 Humph. 608; Eccles *v.* Shannon, 4 Harring. 193; Cook *v.* Bostwick, 12 Wend. 48; Hopkins *v.* Beadle, 1 Cai. 347; Kern *v.* Towsley, 51 Barb. 385; Gorton *v.* Keeler, *id.* 475; Commons *v.* Walters, 1 Port. 377; Hall *v.* Montgomery, 8 Ala. 510; Haws *v.* Stanford, 4 Sneed, 520; Lee *v.* Robertson, 1 Stew. 138; Chapman *v.* Gillett, 2 Conn. 40; as to perjured knave, see note 11, p. 221 *ante*. A., speaking with reference to a complaint preferred by him before the grand jury against B., said that "he went before the grand jury and asked them if they wanted any more witnesses, and they said they had witnesses enough to satisfy them;" *held*, actionable, if he thereby meant to impute the perjury to B. (Rundell *v.* Butler, 7 Barb. 253.) Saying of plaintiff he

Thomas Smith is a perjured man,"[1] or "He perjured himself,"[2] or "He committed perjury by swearing in his vote at the school district meeting;[3] and where the defendant, speaking of an allegation in an affidavit made by the plaintiff, said it was not true and plaintiff had perjured himself, was held to be actionable if the intent was to impute perjury.[4] The words "he swore a false oath," or "he swore a lie," or "he swore false," are not actionable *per se*, nor can an action be maintained for them merely by an innuendo that they imputed or were intended to impute, perjury. There must be an averment and *colloquium* of a *judicial* proceeding.[5] To say of one, he

was under a charge of prosecution for perjury, and that G. W. (an attorney of that name) had the attorney-general's directions to prosecute the plaintiff for perjury, held actionable after verdict for plaintiff. (Roberts *v.* Camden, 9 East, 93.) And saying "I would not swear to what C. W. has for the town of R.; P. W. is honestly mistaken but C. W. is wilful," imputes perjury to C. W. and is actionable. (Walrath *v.* Nellis, 17 How. Pr. R. 72.) See *ante*, § 144 subd. *u*. A charge of subornation of perjury is actionable (Cro. Jac. 158; Beers *v.* Strong, Kirby, 12); as, You have caused this boy to perjure himself (Brownl. 2).

[1] Cummin *v.* Smith, 2 S. & R. 440.

[2] Sandford *v.* Gaddis, 13 Ill. 329. I will prove thee a perjured knave, actionable. (Staverton *v.* Relfe, Yelv. 160.) O. [plaintiff] says I am a perjured rogue; he is a perjured rogue as well as I—held actionable. (Orton *v.* Fuller, Lev. 65.) If I list I can prove him perjured—held not to impute perjury, and therefore not actionable. (Davis' Case, Hutt. 127.)

[3] Crawford *v.* Wilson, 4 Barb. 504.

[4] Cook *v.* Bostwick, 12 Wend. 48. The words "he has delivered false evidence and untruths in his answer to a bill in chancery," held not actionable. (1 Rolle Abr. 70; 3 Inst. 167.) Where the allegation was "we have no reply to make to a lad [plaintiff] convicted of perjury, by the solemn oath of a gentleman, whose veracity is unimpeached," and the context showed that, by convicted it was really meant that the plaintiff was contradicted by the gentleman referred to, held error to instruct the jury that the charge, "convicted of perjury," was actionable, *per se*, as such instruction implied that the charge was of technical perjury. (Pugh *v.* McCarty, 40 Geo. 444.)

[5] Packer *v.* Spangler, 2 Binn. 60; Sheely *v.* Biggs, 2 Har. & J. 363; Power *v.* Miller, 2 McCord, 220; Martin *v.* Milton, 4 Bibb, 99; Sluder *v.* Wilson, 10 Ire. 92; Beswick *v.* Chappel, 8 B. Mon. 486; Roella *v.* Follow, 7 Blackf. 377; Vaughan *v.* Havens, 8 Johns. 109; Chapman *v.* Smith, 13 Johns. 78; Hopkins *v.* Beadle, 1 Cai. 347; Phincle *v.* Vaughan, 12 Barb. 215; Barger *v.* Barger, 18 Penn. State Rep. 489; Blair *v.* Sharp, Breese, 11; McManus *v.* Jackson, 28 Miss. (7 Jones) 56; Watson *v.* Hampton, 2 Bibb. 319; Shinloub *v.* Ammerman, 7 Ind. 347; Mebane *v.* Sellars, 3 Jones' Law (N. Car.), 199; Harris *v.* Woody, 9 Mis. 113; Horn *v.* Foster. 19 Ark. 346;

is "mainsworn," was held actionable when spoken at a place where mainsworn meant perjured.[1] A charge of being forsworn is not actionable *per se*; it imports only "false swearing," and not "perjury." But a charge of "false swearing" may convey to the minds of the hearer an imputation of perjury, and when it does such a charge is actionable *per se*;[2] as where, after a charge of false swearing, the defendant added "I will attend to the grand jury about it;"[3] or, "If you had your deserts you would have been dealt with in the time of it;"[4] or, "For which you would now stand indicted;"[5] or, "To my injury $600;"[6] or, "and done it meaning to cut my throat;"[7] or, "and I will put him through for it if it costs me all I am worth."[8] And held actionable to say of one,

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Harvey *v.* Boies, 1 Penn. 12; Dalrymple *v.* Lofton, 2 Speer, 588; Shaffer *v.* Knitzer 1 Binn. 537; Hall *v.* Montgomery, 8 Ala. 510; Walrath *v.* Nellis, 17 How. Pr. R. 72; Ward *v.* Clark, 2 Johns. 10; Stafford *v.* Grier, 1 Johns. 505; Robertson *v.* Lea, 1 Stew. 141, but see Rue *v.* Mitchell, 2 Dail. 58; Canterbury *v.* Hill, 4 Stew. & Porter, 224; Smale *v.* Hammon, 1 Bulst. 40; Lewis *v.* Soule, 3 Mich. 514; Hall *v.* Weedon, 8 Dowl. & R. 140; Colomes' Case, Cro. Jac. 204. "Mr. H.'s oath is not be taken, for he has been a forsworn man. I can bring people to prove it, and they that know him will not sit in the jury-box with him." Without any *colloquium*, referring the words to the conduct of the plaintiff as a juryman, and no special damage, held not in themselves actionable, and judgment arrested. (Hall *v.* Weedon, 8 D. & R. 140.) "Stanhope hath but one manor, and that he got by swearing and forswearing." (Stanhope *v.* Blith, 4 Co. 15.) In Arkansas, by statute, to charge a person with having sworn falsely or sworn a lie is actionable, without an averment or proof of special damage, or a *colloquium*. (Carlock *v.* Spencer, 2 Eng. 12; McGough *v.* Rhodes, 7 Eng. 625.) And so in Mississippi. Crawford *v.* Mellton, 12 S. & M. 328. See *ante*, § 153.

[1] Hob. 12.

[2] Sherwood *v.* Chace, 11 Wend. 38; Crookshank *v.* Gray, 20 Johns. 344; McClaughry *v.* Wetmore, 6 Johns. 82; Jacobs *v.* Fyler, 3 Hill, 572; Coons *v.* Robinson, 3 Barb. 625; Morgan *v.* Livingston, 2 Rich. 573; Hillhouse *v.* Dunning, 6 Conn. 391. Defendant said, Thou art a *forsworn* fellow; plaintiff answered, Will you say that I am perjured? defendant said, Yes, if you will have it so—held not actionable. (Levermore *v.* Martin, Cro. Eliz. 297.)

[3] Gilman *v.* Lowell, 8 Wend. 573.

[4] Phincle *v.* Vaughan, 12 Barb. 215.

[5] Pelton *v.* Ward, 3 Cai. 73.

[6] Jacobs *v.* Fyler, 3 Hill, 572.

[7] Coons *v.* Robinson, 3 Barb. 625.

[8] Corne *v.* Angell, 14 Mich 340.

"Thou art a forsworn man. I will teach thee the price of an oath, and will set thee on the pillory;"[1] or, "You swore a lie, and I can prove it," used in reference to a judicial proceeding in which the plaintiff had testified as a witness;[2] or, under similar circumstances, the words, "He swore a lie."[3] Where the charge is of false swearing before a particular court or tribunal, or in a particular proceeding, naming it, the charge is actionable if the court or tribunal named is one authorized to administer an oath, or if the proceeding named is a judicial proceeding; thus it has been held actionable to say of one, he swore false before the grand jury;[4] or, "Thou art a forsworn knave, and I will prove thee to be forsworn in the spiritual court;"[5] or, "Thou wast forsworn before my Lord Chief Justice in evidence;"[6] or "before a justice of the peace;"[7] or, "in Ilston Court," a court leet so named;[8] or, "I had a lawsuit with A., and B. (the plaintiff) swore falsely against me, and I have advertised him as such;"[9] or, "You swore false at the trial of your brother John."[10] Held not actionable to say of one, "Thou wert for-

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[1] 1 Starkie on Slander, 91.

[2] Lewis *v.* Black, 27 Mass. (5 Cush.) 425; Rhineheart *v.* Potts, 7 Ired. 403; Rainey *v.* Thornbury, 7 B. Monr. 475; Sherwood *v.* Chace, 11 Wend. 38.

[3] Harris *v.* Purdy, 1 Stew. 231; and see Wilson *v.* Harding, 2 Blackf. 190; Gibbs *v.* Tucker, 2 A. K. Marsh, 219; and 6 T. R. 691.

[4] Perselly *v.* Bacon, 20 Miss. 330.

[5] Shaw *v.* Thompson, Cro. Eliz. 609; and see Rex *v.* Foster, Russ. & R. Cr. Cas. Res. 459; Stat. 40 Geo. 4, ch. 76. False swearing before an ecclesiastical tribunal is not perjury in Pennsylvania. (Harvey *v.* Boies, 1 Penns. 12.) *contra* in Connecticut. (Chapman *v.* Gillet, 2 Conn. 40.)

[6] Le. 127.

[7] Gurneth *v.* Derry, 3 Lev. 166; 4 Coke, 17.

[8] Marshall *v.* Dean, Cro. Eliz. 720.

[9] Magee *v.* Stark, 1 Hump. 506. The words, I had a lawsuit, imply a judicial proceeding. (*Id.*)

[10] Fowle *v.* Robbins, 12 Mass. 498. The words were held actionable after verdict; and see Cro. Car. 378; but the words, you swore falsely on the trial of a case between me and A. before Squire J., were held not actionable. (Dalrymple *v.* Lofton, 2 Speer, 588.)

sworn at Whitechurch court;"[1] or "Thou art a false and forsworn knave, and that I will prove, for thou forswore thyself against Peter Rumball in the hundred court."[2] An arbitration is a judicial proceeding, and false swearing in such a proceeding is perjury; therefore, to charge false swearing in such a proceeding is actionable;[3] but perjury cannot be predicated of evidence in a controversy relative to pre-emption rights before the registers, &c., of the land office, and therefore a charge of false swearing in such a controversy is not actionable.[4] Ordinarily words are actionable which imply in their customary import that a false oath has been taken in a judicial proceeding,[5] as, you swore false in court,[6] and this, although the proceeding referred to never had any existence.[7] Saying of one, he swore to a damned lie, but I am not liable because I have not said in what suit he testified, was held not action-

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[1] Cro, Car. 378, because it did not appear that Whitechurch court was a court of record, and for the same reason the words "He has forsworn himself in a Leake court," were held not actionable. (1 Rolle Abr. 39; 6 Bac. Abr. 207. See Dalton *v.* Higgins, 34 Geo 433.) But the words, "A. C. is a forsworn man, and hath taken a false oath in his deposition at Tiverton, where he waged his law against me," were held actionable because the forswearing appeared to amount to perjury. (Cro. Jac. 204.)

[2] Core *v.* Morton, Yelv. 27. So ruled after verdict.

[3] Moore *v.* Horner, 4 Sneed, 491; Ross *v.* Rouse, 1 Wend. 475; Bullock *v.* Koon, 9 Cow. 30; and see Sandford *v.* Gaddis, 13 Ill. 329.

[4] Hall *v.* Montgomery, 8 Ala. 510. *Held* not actionable to charge a voter with swearing falsely at an election for alderman for the City of Toronto. (Thomas *v.* Platt, 1 Up. Can. Q. B. 217.) Where the imputation was that plaintiff had taken a false oath, but not in a judicial proceeding, the plaintiff had a verdict for £2. 10 damages. The court refused a new trial, but arrested the judgment, the words not being actionable. (Hogle *v.* Hogle, 16 Up. Can. Q. B. 518.)

[5] Cass *v.* Anderson, 33 Verm. 182.

[6] Hamilton *v.* Dent. 1 Hayw. (N. Car.) 116; see *ante*, note 10, p. 230.

[7] Bricker *v.* Potts, 12 Penn. St. R. 200; Henry *v.* Hamilton, 7 Blackf. 506. And though an affidavit for a warrant be insufficient to justify the granting of it, an action may be maintained for imputing perjury in making the affidavit, if any fact set forth in it be material to the application. (Dayton *v.* Rockwell, 11 Wend. 140; and see Bell *v.* Farnsworth, 11 Humph. 608.) Slander will lie on an accusation of perjury in a criminal cause, although the complaint therein was too defective for an irreversible judgment. (Wood *v.* Southwick, 96 Mass. 354.)

able.[1] To say to a witness whilst giving his testimony on a trial in court, "that is a lie;[2] or, "I believe you swear false. It is false what you say;"[3] or, "You have sworn a manifest lie,"[4] is actionable.

Swearing falsely as to immaterial matter does not amount to perjury, and therefore to charge false swearing as respects matter which is immaterial to the issue involved, cannot in any event or under any circumstances, be actionable;[5] thus, saying of one that on a certain trial he testified to what was false, that the matter so testified to was immaterial, but that he, the party testifying, showed great disregard for the truth, was held not actionable.[6] The test of materiality is not whether the witness believes his testimony to be material, but whether if false he can be indicted for perjury. If the testimony is in fact immaterial, it cannot be perjury, though it may be false, and whatever may be the opinion of the witness.[7] Another essential element of perjury is, that the oath alleged to have been broken was administered by competent authority, and therefore to charge the breach of an oath not administered by competent authority would not be actionable.[8] [§§ 321, 322.]

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[1] Muehler *v.* Mulhollen, Supp. to Hill & Denio's Rep. 263.

[2] Mower *v.* Watson, 11 Verm. 536. Probably not actionable to say, "He swore to a lie if he swore as Jones said he did." (Evarts *v.* Smith, 19 Mich. 55.) See § 224 *post.*

[3] Cole *v.* Grant, 3 Harr. 327.

[4] Keane *v.* McLaughan, 2 S. & R. 469; McClaughry *v.* Wetmore, 6 Johns. 82 *contra* Badgley *v.* Hedges, 1 Penns. 233.

[5] Horn *v.* Foster, 19 Ark, 346; Darling *v.* Banks, 14 Ill. 47; Wilson *v.* Oliphant Wright, 153; Crookshank *v.* Gray, 20 Johns. 344; Ross *v.* Rouse, 1 Wend. 475; Dayton *v.* Rockwell, 11 Wend. 140; Power *v.* Price, 12 Wend. 500; S. C. 16 Wend. 450; Roberts *v.* Chaplin, 14 Wend. 120; Wilson *v.* Cloud, 2 Speer, 1; Owen *v.* McKean, 14 Ill. 459; M'Gough *v.* Rhodes, 7 Eng. 625.

[6] Stone *v.* Clark, 21 Pick. 51; and see McKinley *v.* Rob, 20 Johns, 351; Smith *v.* Smith, 8 Ired. 29; Wilson *v.* Cloud, 2 Speer, 1.

[7] Ross *v.* Rouse, 1 Wend. 475. Perjury may be alleged in swearing to a promise within the statute of frauds, and therefore false swearing as to such a promise may be actionable. (Howard *v.* Sexton, 8 N. Y. 157.)

[8] Jones *v.* Marrs, 11 Humph. 214; Dalton *v.* Higgins, 34 Geo. 433; and see

§ 172. Ordinarily, and in the absence of any statutory provision (§ 153,) words published orally charging a woman with want of chastity are not actionable *per se*;[1] as, thus, except in the City of London and Borough of Southwark it is not actionable to call a woman a whore,[2]

Vansteenburgh *v.* Kortz, 10 Johns. 167; Niven *v.* Munn, 13 Johns. 48; Cro. Car. 378; 1 Rolle Abr. 39.

[1] 1 Starkie on Slander, 28; Byron *v.* Elmes, 2 Salk. 693; W. *v.* L., 2 Nev. & M. 204; Berry *v.* Carter, 4 Stew. & Port, 387; Eliot *v.* Ailsbury, 2 Bibb, 473; Keiler *v.* Lessford, 2 Cr. C. C. 190; Ranger *v.* Goodrich, 17 Wis. 78; Rogers *v.* Lacey, 23 Ind. 507; *contra* in Connecticut (Frisbie *v.* Fowler, 2 Conn. 707), in Kentucky, since the statute of 1811 (McGee *v.* Wilson, Litt. Sel. Cas. 187; Smalley *v.* Anderson, 2 Monr. 56), in Illinois (Spencer *v.* M'Masters, 16 Ill. 405), in Missouri (Moberly *v.* Preston, 8 Mis. 462; Stieber *v.* Wensel, 19 Mis. 513), in Ohio (Malone *v.* Stewart, 15 Ohio, 319; Wilson *v.* Robbins, Wright, 40; Wilson *v.* Runyan, *id.* 351; Sexton *v.* Todd, *id.* 317), in Maryland (Terry *v.* Bright, 4 Md. 430), in Alabama (Sidgreaves *v.* Myatt, 22 Ala. 617; but see Berry *v.* Carter, 4 Stew. & Port. 387), in Indiana, (Shields *v.* Cunningham, 1 Blackf. 86; Worth *v.* Butler, 7 *id.* 251; Rodeburg *v.* Hollingsworth, 6 Ind. 639; Rodgers *v.* Lacey, 23 Ind. 507; Linck *v.* Kelley, 25 Ind. 278; Blinkenstaff *v.* Perrin, 27 Ind. 527), in North Carolina (McBrayer *v.* Hill, 4 Ired. 136; Snow *v.* Witcher, 9 *id.* 346), in South Carolina (Watts *v.* Greenlee, 2 Dev. 115; Freeman *v.* Price, 2 Bailey, 115), in Iowa (Beardsley *v.* Bridgman, 17 Iowa, 290; Cleveland *v.* Detweiler, 18 *id.* 299; Cox *v.* Bunker, Morris, 369; Dailey *v.* Reynolds, 4 G. Greene, 354; Freeman *v.* Taylor, 4 Iowa, 424; Smith *v.* Silence, *id.* 321.)

[2] 12 Mod. 106; Holt R. 40; Keb. 418; Sid. 97; Robertson *v.* Powell, 2 Selw. N. P. 1224; Alsop *v.* Alsop, 5 Hurl. & Nor. 534; Williams *v.* Holdridge, 22 Barb. 397; Linney *v.* Malton, 13 Texas, 449; Underhill *v.* Welton, 32 Verm. 40; Boyd *v.* Brent, 3 Brev. 241; *contra*, Pledger *v.* Hatchcock, 1 Kelly, 550; Cox *v.* Bunker, 1 Morris, 269. Drunken whore held actionable (Williams *v.* Greenwade, 3 Dana, 432); and so was whore. (Smith *v.* Silence, 4 Iowa, 321; Kelly *v.* Dillon, 5 Ind. 426; Clarke *v.* Mount, Opinions in the Mayor's C't, 18.) The following words have been held actionable: You are a whore. I can have a better whore for a groat; you get your living by your tail; or, You are a whore, and have played the whore with so many men you cannot number them; or, Thou art a whore and hast been carted; or, Thou art a whore and hast been in Bridewell; or, Thou art a whore, and hast emptied thy cask in the country; or, Thou art a whore, and thy plying place is in Cheapside, where thou gettest 40s. a day. (Vin. Abr. Act. for Words, D. *a.* 45, 39, 42.) The words import more than the bare calling a woman whore. (Hicks *v.* Joyce, Sty. 394.) Common whore held actionable (Green *v.* How, Sty. 323.) And held actionable to call one a whore who held a copyhold *dum casta vixerit.* (Boys *v.* Boys, Sid. 214.) But held not actionable to say to or of a woman, "You are a whore, and keep a man to lie with you" (Gascoigne *v.* Ambler, 2 L'd Raym. 1004); or, "She is a whore, and had a bastard by her father's apprentice." (Graves *v.* Blanchard, 2 Salk. 696; and see Anon. *id.* 694.) Calling a woman "whorish bitch," actionable in Alabama. (Scott *v.* McKinnish, 15 Ala. 662.) To call a woman a strumpet is not equivalent to calling her a whore. (Williams *v.* Bryant, 4 Ala. 44; *contra*, Cook *v.*

or prostitute, or common prostitute,[1] or to charge an unmarried woman with having had a bastard,[2] or to call a woman a bawd,[3] or to charge an unmarried woman with fornication,[4] or a married woman with adultery,[5] or a woman with being of a wanton and lascivious disposition,[6] or to say of a woman, she was hired to swear the child on me; she has had a child before this, when she went to Canada; she would come damned near going to the state prison.[7] But it has been held actionable to say of a woman, she is a "loose woman," [8] or to charge conduct amounting to open and gross lewdness,[9] or to say of a married woman, she slept with one not her husband,[10] or to charge an un-

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Wingfield, 1 Stra. 555.) By custom in the city of Bristol it is actionable to call a woman strumpet. (Power *v.* Shaw, 1 Wils. 62). See in § 213, *post.*

[1] Brooker *v.* Coffin, 5 Johns. 188; Wilby *v.* Elston, 8 C. B. 142; 7 Dowl. & L. 143; 1 Starkie on Slander, 28. See *ante,* § 144, subd. *y.*

[2] Vin. Abr. Act. for Words, D. *a.* 19, 23; Graves *v.* Blanchard, 2 Salk. 696, in note 2, p. 233, *ante;* and saying to a married woman, "Thou bold cullobine, bastard-bearing whore, thou didst throw thy bastard into the dock at Whitechapel," held not actionable. (Colabyn *v.* Viner, Jones, 356.) So saying of a woman, She had a child, and either she or somebody else made away with it, was held not actionable. (Falkner *v.* Cooper, Carth. 55.)

[3] Cavel *v.* Birket, Sid. 438; *contra,* Hicks *v.* Hollingshead, Cro. Car. 261.

[4] Buys *v.* Gillespie, 2 Johns. 115; such a charge is actionable in Kentucky (Smalley *v.* Anderson, 2 Monr. 56), in Ohio (Wilson *v.* Robins, Wright, 40), in North Carolina (McBrayer *v.* Hill, 4 Ired. 136), in Indiana (Rickett *v.* Stanley, 6 Blackf. 169), and in New Jersey (Joralemon *v.* Pomeroy, 2 N. Jersey, 271). Charging an unmarried woman with being "a bad character," and guilty of fornication, held actionable in Iowa. (Dailey *v.* Reynolds, 4 Greene, 354.) And see *ante,* § 144, subd. *l.,* and *post,* note 6, p. 238.

[5] Woodbury *v.* Thompson, 3 N. Hamp. 194; Stanfield *v.* Boyer, 6 Har. & J. 248; *contra,* Miller *v.* Parish, 8 Pick. 384; and see Walton *v.* Singleton, 7 S. & R. 449. To charge a woman with fornication or adultery, or incontinence in any form, is not actionable at common law. (Heard on Libel, p. 46, citing in addition to the cases already noted, Ayre *v.* Craven, 2 Adol. & El. 2; 4 Nev. & M. 220; Evans *v.* Gwyn, 5 Q. B. 844.)

[6] Lucas *v.* Nichols, 7 Jones' Law, No. Ca. 32.

[7] Brooker *v.* Coffin, 5 Johns. 188.

[8] Adecock *v.* Marsh, 8 Ired. 360.

[9] Underhill *v.* Welton, 32 Verm. 40.

[10] Guard *v.* Risk, 11 Ind. 156.

married woman with being in the family-way;[1] and adding, I can prove it by A. that she has been taking camphor and opium pills to produce an abortion;[2] or, she had two or three little ones to A.;[3] or, her child is A.'s and A. was keeping her unmarried for his own purposes;[4] or charging sexual intercourse with a dog;[5] and where the defendant said of the plaintiff that B. told him that on Sunday, at the camp-meeting, he scared the plaintiff and a man up from behind a log; that they broke and run, and that he (B.) got her (plaintiff's) parasol and handkerchief, held that these words were actionable;[6] but saying of a woman, she went down the river to the *goose-house*, without averring any special meaning to goose-house, was held not actionable.[7]

§ 173. The following words and phrases published orally of an individual as such, have been held actionable *per se:* Bogus peddler,[8] dealer in counterfeit money,[9]

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[1] Smith *v.* Minor, Coxe, 16; Miles *v.* Van Horn, 17 Ind. 245; *contra*, see Shepherd *v.* Wakeman, Sid. 79; Lev. 37.

[2] Miles *v.* Van Horn, 17 Ind. 245. "It's my soul's opinion that nothing else kept that girl in the house last winter but taking medicine to banish the young baker," innuendo that plaintiff had taken medicine to procure an abortion, held actionable. (Miller *v.* Houghton, 10 Up. Can. Q. B. R. 348.) And held actionable to say of a woman, "She procured or took medicines to kill the bastard child she was like to have, and she did kill or poison the bastard child she was like to have." (Widrig *v.* Oyer, 13 Johns. 124.)

[3] Symonds *v.* Carter, 32 N. Hamp. 458, and *ante*, note 2, p. 234; Beardsley *v.* Bridgman, 17 Iowa, 290.

[4] Richardson *v.* Roberts, 23 Geo. 215; Downing *v.* Wilson, 36 Ala. 717. She (plaintiff) is not chaste. I have kept her, and had criminal intercourse with her; or, "I have had sexual intercourse with her," held not actionable. (Berry *v.* Carter, 4 Stew. & Port. 387; *contra*, Adams *v.* Rankin, 1 Duval (Ky) 58.) The words, I have lain with her and pockified her, held actionable. (Neal *v.* Mallard, 2 Show. 312.)

[5] Cleveland *v.* Detweiler, 18 Iowa, 299, and see *ante*, note, p. 173.

[6] Proctor *v.* Owens, 18 Ind. 21.

[7] Dyer *v.* Morris, 4 Mis. 214.

[8] Pike *v.* Van Wormer, 6 How. Pr. R. 101; 5 *id.* 175.

[9] Pike *v.* Van Wormer, 6 How. Pr. R. 99.

knave,[1] pickpocket,[2] sheepstealer,[3] traitor,[4] common barrator or champertor,[5] receiver of stolen goods,[6] counterfeiter.[7] I charge you with felony;[8] you are a rogue, and I will prove you a rogue, for you forged my name;[9] concealing stolen goods,[10] purchasing stolen goods, knowing them to have been stolen.[11] Hog thief.[12] He is a rogue, and has stolen my sheep.[13] You have altered the marks of four of my hogs;[14] he killed a horse.[15] You have removed my

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[1] Knave imports dishonesty, and is actionable. Harding *v.* Brooks, 5 Pick. 244; *contra*, see Weeks' case, 1 Sid. 149, Latch, 159, and Monthly Law Rep. Oct. 1862, p. 716. Pillory knave held actionable (Brown *v.* Dankes, Cro. Eliz. 11), denied (Smith's case, Cro. Eliz. 31.) In the time of Henry VI knave was a good addition to a man's name, and the term had not a defamatory meaning. There is said to be an edition of the New Testament, which reads: Paul a *knave*, of Jesus Christ, instead of Paul, an *apostle*, &c.

[2] Stebbing *v.* Warner, 11 Mod. 255, and see note 2, p. 197, *ante*.

[3] Parret *v.* Parret, 3 Bulst. 303; Vin. Abr. Act. for Words, I. *a.* 5.

[4] Dal. 17. Bellingham *v.* Minors, Cro. Eliz. 133.

[5] Vin. Abr. Act. for Words, H. *a.* 7; Heake *v.* Moulton, Yelv. 90; Box *v.* Barnaby, Hob. 117, but maintainer of suits is not actionable. (*Id.*) See *contra*, Portman *v.* Stowell, Mo. 43.

[6] Dias *v.* Short, 16 How. Pr. R. 322. To charge one with having received stolen goods is not actionable, unless the receiving was with a guilty knowledge (*Id.*); and Patterson *v.* Collins, 11 Up. Can. Q. B. R. 63. See Dorsey *v.* Whipps, 8 Gill. 457; Cox *v.* Humphreys, Cro. Eliz. 877; Steventon *v.* Higgins, 2 Keb. 338; Dawes *v.* Bolton, Cro. Eliz. 888, see note 2 page 178, *ante*.

[7] Howard *v.* Stephenson, 2 Rep. Conn. C't 408; Thirman *v.* Matthews, 1 Stew. 384. The law takes notice of the word counterfeit, as importing a felony. (Stone *v.* Smalcombe, Cro. Jac. 684.)

[8] Vin. Abr. Act. for Words, G. *a.* 3; Jones, 32; Smith *v.* Hodgeskins, Cro. Car. 276; Poph. 210; Paine *v.* Prestny, Sty. 235.

[9] Jones *v.* Hearne, 2 Wils. 87, and see Herst *v.* Borbidge, 57 Penns. 62.

[10] Miller *v.* Miller, 8 Johns. 74; and see Newlyn *v.* Fassett, Yelv. 154.

[11] Alfred *v.* Farlow, 8 Adol. & El. N. S. 854; Mayo *v.* Sample, 18 Iowa, 306; Brigg's Case, Godb. 157; and see Dorsey *v.* Whipps, 8 Gill, 457.

[12] Cheatwood *v.* Mayo, 5 Munf. 16.

[13] McAlexander *v.* Harris, 6 Munf. 465.

[14] Perdue *v.* Burnett, Minor, 138; *contra*, Williams *v.* Karnes, 4 Humph. 9; Johnston *v.* Morrow, 9 Porter, 525.

[15] Gage *v.* Shelton, 3 Rich. 242. He cut my horse's throat is actionable. (Yearly *v.* Ashley, 4 Har. & J. 314.) He poisoned my cow, held actionable. (Burton *v.* Burton, 3 Iowa, 316,) *contra* of He poisoned my horse. (Chaplin *v.* Cruikshanks, 2 Har. & J. 247.)

land-marks; cursed is he that removeth a land-mark.[1] She put poison in a barrel of drinking-water to poison me.[2] You are a vagrant,[3] a corn-stealer,[4] concealer of felony.[5] He is a rogue and villain; he has ruined many families, and the curses of widows and children are on him; he has wronged my father's estate, and cheated my brother.[6] She produced a false heir, or a bogus baby;[7] she *kept* a bawdy-house,[8] or she keeps a whore-house;[9] indecent exposure;[10] bribery to secure election;[11] breaking open a letter addressed to another, and taking out money and using the money so taken.[12] You have committed an act for which I can transport you.[13] I know enough he has done to send him to the penitentiary.[14] I am thoroughly convinced that you are guilty (innuendo of the

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[1] Young *v.* Miller, 3 Hill, 21.

[2] Miles *v.* Wimp, 10 B. Monr. 417.

[3] Miles *v.* Oldfield, 4 Yeates, 423. See note 19, p. 239.

[4] Vin. Abr. Act. for Words, G. *a.* 24; Anon. Cro. Eliz. 563.

[5] Thou art a concealer of felony, and it lieth in my power to hang thee. Vin. Abr. Act. for Words, G. *a.* 21; Yelv. 154. M. hath stolen sheep, and Nichols by agreement hast taken a meadow to help him to cloak and escape the felony, held actionable, although not alleged that Nichols knew of the felony for taking the meadow to cloak the felony implied he had notice of it. (Nichols *v.* Badget, Mo. 428.) And see Rich *v.* Holt, Cro. Jac. 268.

[6] Marshall *v.* Addison, 4 Har. & McHen. 537.

[7] Weed *v.* Bibbins, 32 Barb. 315.

[8] The offense, although past, is still punishable. (Newton *v.* Masters, 2 Lev. 233; Martin *v.* Stillwell, 13 Johns. 275; Vin. Abr. Act. for Words, H. *a.* 8.) See *ante*, § 144, subd. *d.* A charge of keeping a bawdy house was held not actionable. Anon. Cro. Eliz. 643.

[9] Wright *v.* Paige, 36 Barb. 438. Aff'd 3 Trans. App. 134. See *ante*, § 144 subd. *d.*

[10] Torbett *v.* Clare, 8 Ir. Law Rep. 86.

[11] Bendish *v.* Lindsay, 11 Mod. 194; Hoag *v.* Hatch, 23 Conn. 585, or to procure an appointment under the government. (Purdy *v.* Stacey, 5 Burr. 2698. See Lindsey *v.* Smith, 7 Johns. 359; Chipman *v.* Cook, 2 Tyler, 456.)

[12] Cheadle *v.* Buel, 6 Ham. 67; see McCuen *v.* Ladlam, 2 Harr. 12; Bell *v.* Thatcher, Freeman, 276; Hillhouse *v.* Peck. 2 Stew. & Port. 395.

[13] Curtis *v.* Curtis, 4 Mo. & Sc. 337: 10 Bing. 477.

[14] Johnson *v.* Shields, 1 Dutcher, 116.

death of D.), and rather than you should go without a hangman I will hang you.[1] Fraudulently destroying a vote;[2] signing name to a note without authority;[3] he has been excommunicated,[4] whoremonger,[5] fornication, when or where punishable by indictment.[6] He hath got M. N. with child.[7] He should [would] have been hanged for a rape, but it cost him all the money in his purse.[8] You will lie with a cow again as you did. If you had your deserts you deserve to be hanged.[9] You (plaintiff) are as great a rogue as your master, who is a rogue for that he stole rugs.[10] Adultery in certain States in which it is punishable as a crime.[11] Incontinence.[12]

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[1] Peake *v.* Oldham, Cowp. 275; 2 W. Black. 960.

[2] Dodds *v.* Henry, 9 Mass. 262.

[3] Creelman *v.* Marks, 7 Blackf. 281.

[4] The defendant, a minister, pronounced in church that the plaintiff had been excommunicated, and refused to proceed with the service until plaintiff left the church, held actionable. (Barnabas *v.* Traunter, Vin. Abr. Act. for Words, D. *a.* 15.)

[5] Vin. Abr. Act. for Words, D. *a.* 26; see note 4, p. 240, *post.*

[6] 2 Sid. 21; Joralemon *v.* Pomeroy, 2 N. Jersey, 271. In Kentucky a man may maintain an action of slander for words charging him with having been guilty of fornication (Morris *v.* Barkley, 1 Litt. 64; see also, Phillips *v.* Wiley, 2 *Ib.* 153); so in Indiana, under the statute of that State (Rodgers *v.* Lacey, 23 Ind. 507); and so in Pennsylvania, though he be a married man (Walton *v.* Singleton, 7 S. & R. 449), but not so in Ohio. (Wilson *v.* Robbins, Wright, 40; and see Dukes *v.* Clarke, 2 Blackf. 20). And for such a charge a woman may maintain an action in Missouri, Indiana and New Hampshire. (Moberly *v.* Preston, 8 Mis. 462; Abshire *v.* Cline, 3 Ind. 115; Symonds *v.* Carter, 32 N. H. 468;) and see note 4, p. 234, *ante.*

[7] Marston *v.* Dennis, 2 Sid. 1657. Sir John Lenthal lay with me, and had the use of my body *by force*, held actionable; the majority of the court being of opinion that the words *by force* imputed a rape (Lenthall's Case, Litt. Rep. 337; and see Taylor *v.* Tally, Palmer, 385, where a charge that T. *ravished* H.'s wife, was held actionable). The words, He had the use of my wife's body *by force*, with allegation of special damage that in consequence of the words plaintiff was arrested on a charge of rape, and put to expense in making his defense, held actionable. (Harris *v.* Smith, Vin. Abr. Act. for Words, D. *a.* 9.)

[8] Redfern *v.* Todd, Cro. Eliz. 589.

[9] Poturite *v.* Barrel, Sid. 220.

[10] Apton *v.* Penfold, Comyn's R. 267.

[11] Steber *v.* Wensel, 19 Mis. 513; Farnsworth *v.* Storrs, 5 Cush. 412; Richett *v.* Stanley, 6 Blackf. 169. See *ante*, § 144, subd. *a*, and *post*, note 1, p. 239.

[12] Watts *v.* Greenlee, 2 Dev. 115. See *ante*, § 153, and *post*, § 195.

§ 174. The following words and phrases published orally of an individual as such, have been held *not* actionable *per se*:—Adulterer,[1] bawd,[2] bankrupt,[3] blackleg,[4] cheat,[5] common filcher,[6] companion of cut-throats,[7] deserter,[8] enchanter,[9] liar,[10] rogue,[11] arrant rogue,[12] damned rogue,[13] you are a rogue and cheated J. S. out of £100,[14] sacrilege,[15] scoundrel,[16] sorcerer,[17] swindler,[18] vagrant or vagabond,[19]

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[1] Vin. Abr. Act. for Words, G. *a.* 12; D. *a.* 27.

[2] Vin. Abr. Act. for Words, H. *a.* 9.

[3] Vin. Abr. Act. for Words, H. *a.* 6.

[4] Barnett *v.* Allen, 3 Hurl. & Nor. 376.

[5] Chase *v.* Whitlock, 3 Hill, 139; Stevenson *v.* Hayden, 2 Mass. 406; Vin. Abr. Act. for Words, G. *a.* See note 9, p. 241, *post.*

[6] Vin. Abr. Act. for Words, G. *a.*

[7] Vin. Abr. Act. for Words, G. *a.*

[8] Hollingsworth *v.* Shaw, 19 Ohio, 430.

[9] Vin. Abr. Act. for Words, H. *a.*

[10] Smalley *v.* Anderson, 4 Monr. 367; *King's Case,* 4 Inst. 181; and see *ante,* § 144, subd. *q.*

[11] Artieta *v.* Artieta, 15 La. Ann. 48; Idol *v.* Jones, 2 Dev. 162; Quinn *v.* O'Gara, 2 E. D. Smith, 388. "Your father was a horse-stealing rogue, and you (plaintiff) are a great rogue," not actionable (Bellamy *v.* Barker, 1 Strange, 304). Rogue, rascal, scoundrel, and the like, are not actionable. (1 Starkie on Slander, 24.) After verdict for plaintiff in an action for calling him "a rogue," the court refused to arrest the judgment. (Borbidge *v.* Herst, 6 Phil'a. Rep. (Legal Intel. Cond.) 391; s. c. Herst *v.* Borbidge, 57 Penns. 62.)

[12] Vin. Abr. Act. for Words, G. *a.*

[13] Oakley *v.* Farrington, 1 Johns. Cas. 129; Caldwell *v.* Abby, Hard. 529. God damned rogue, not actionable. (Ford *v.* Johnson, 21 Geo. 399.)

[14] Winter *v.* Sumvalt, 3 Har. & J. 38. Saying one was a rogue of record, was helda ctionable. (Sty 220.)

[15] Gawdy *v.* Smith, Sid. 376.

[16] Quinn *v.* O'Gara, 2 E. D. Smith, 388.

[17] Vin. Abr. Act. for Words, H. *a.*

[18] Chase *v.* Whitlock, 3 Hill, 139; Saville *v.* Jardine, 2 H. Black. 531; Odiorne *v.* Bacon, 6 Cush. 185; Stevenson *v.* Hayden, 2 Mass. 406. To say of a bank director he is a swindler held actionable. (Forrest *v.* Hanson, 1 Cr. C. C. 63.) To write of one he is a swindler is actionable (T'Anson *v.* Stuart, 1 T. R. 748). See notes 3, 4, p. 247, *post.*

[19] Corcoran *v.* Corcoran, 7 Ir. L. R. N. S. 272; Campbell *v.* White, 5 *Id.* 312, but see Miles *v.* Oldfield, 4 Yeates, 423.

varlet,[1] villain,[2] witch,[3] whoremaster,[4] bastard.[5] He is father of a bastard.[6] He cozened J. S. of one hundred marks.[7] He cozened the Earl of H. of as much as he (plaintiff) is worth.[8] You cozened me of £1,200 at one time.[9] Your master (plaintiff) is a cozening, cheating knave, and a rogue to boot, and cozened and cheated all the parish and all persons he deals with.[10] Those two rascals (plaintiff and his brother) killed my hogs and converted them to their own use.[11] The library has been plundered by C. (the plaintiff).[12] He killed and salted one of my hogs.[13] He defrauded a meal man of a horse.[14] He robbed the treasury and bought a farm with it.[15] He embezzled goods.[16] He attempted to commit a robbery.[17] He passed counterfeit money.[18] He cut off the tail of my

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[1] Vin. Abr. Act. for Words, G. *a*.

[2] Vin. Abr. Act. for Words, G. *a*.

[3] Vin. Abr. Act. for Words, H. *a*. Witch and sorcerer were actionable, whilst the statutes against witchcraft remained in force. (Rogers *v*. Gravat, Cro. Eliz. 571.) "Heretic" or "Papist," not actionable. (Vin. Abr. Act. for Words, D. *a*.)

[4] Witcher's Case, Keb. 119; Vin. Abr. Act. for Words, D. *a*. But actionable with special damage. (Crass *v*. Mathew, Cro. Jac. 323; 2 Bulst. 86.)

[5] Not actionable unless special damage. Vin. Abr. Act. for Words, D. *a*. 16, 17, 18, 21, 22, 31; Nelson *v*. Staff, Cro. Jac. 432. Humphreys *v*. Stanfield, Cro. Car. 469.

[6] Unless the bastard is chargeable to the parish. (Salter *v*. Brown, Cro. Car. 436; Randle *v*. Beal, Cro. Jac. 473.)

[7] Somerstaile's Case, Goldsb. 125.

[8] Tut *v*. Kerton, 1 Bulst. 172.

[9] Townsend *v*. Barker, Sty. 388. Thou hast no more than thou has got by cozening, not actionable. (Broomfield *v*. Snoke, 12 Mod. 307.)

[10] Tamlin *v*. Hamlin, Show. 181. "Thou are a cozening knave, and hast cozened thy master of a bushel of barley," spoken of a servant in husbandry held actionable. (Seaman *v*. Bigg, Cro. Car. 480.)

[11] Sturgenegger *v*. Taylor, 2 Brevard, 480.

[12] Carter *v*. Andrews, 16 Pick. 1; and see Mackay *v*. Ford, 5 H. & N. 792.

[13] Clay *v*. Barkley, Ky. Dec. 79.

[14] Richardson *v*. Allen, 2 Chit. 654.

[15] Allen *v*. Hillman, 12 Pick. 101.

[16] Caldwell *v*. Abbey, Hard. 529; and see Williams *v*. Stott, 1 Cr. & M. 675; 3 Tyrw. 688.

[17] Russell *v*. Wilson, 7 B. Monr. 261.

[18] Church *v*. Bridgman, 6 Miss. 190.

horse.[1] He harbored my negroes.[2] He whipped his wife,[3] or his mother.[4] He is a mulatto and akin to negroes.[5] He gave a free pass to a negro.[6] He (plaintiff) is a brabbler and a quarreller, for he gave his champion counsel to make a deed of gift of his goods, to kill me and then to fly out of the country, but God preserved me.[7] His (plaintiff's) boys did frequently come to our house and hire our negroes and take the dogs and go down into the river bottom and killed cattle no more theirs than mine.[8] You cheated the lawyer of his linen and stood bawd to your daughter to make it up with him; you cheat everybody, you cheated me of a sheet, you cheated T. S., and I will let him know it.[9] She secreted one shilling under the till; stating these are not times to be robbed.[10] She is an hermaphrodite.[11] He is a blood-sucker, and not worthy to live in a commonwealth, and his child, unborn, is bound to curse him.[12] Thy credit hath been called in question and a jury being to pass upon it, thou foistedst on a jury early in the morning, and the lands thou hast are gotten by lewd practices.[13] Thou wast the cause that J. S. did hang himself, and that R. N. did

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[1] Gage *v.* Shelton, 3 Rich. 242.

[2] Croskeys *v.* O'Driscoll, 1 Bay, 481; Skinner *v.* White, 1 Dev. & Bat. 471.

[3] Birch *v.* Benton, 26 Miss. 153; Dudley *v.* Horn, 21 Ala. 379.

[4] Speaker *v.* McKenzie, 26 Miss. 255.

[5] Barrett *v.* Jarvis, 1 Ham. 83 note. But such a charge was held actionable. (Eden *v.* Legare, 1 Bay, 171; Atkinson *v.* Hartley, 1 McCord, 203; King *v.* Wood, 1 N. & M. 184.)

[6] McManus *v.* Jackson, 28 Miss. 56.

[7] Eaton *v.* Allen, 4 Co. 16.

[8] Porter *v.* Hughey, 2 Bibb, 232.

[9] Davis *v.* Miller, 2 Strange, 1169; and see note 5, p. 239, *ante*.

[10] Kelly *v.* Partington, 2 Nev. & M. 460.

[11] The words were spoken of one who taught dancing, and held not actionable, because men as well as women taught dancing (Weatherhead *v.* Armitage, 2 Levinz, 233). But in Ohio it has been held actionable to call a woman an hermaphrodite. (Malone *v.* Stewart, 15 Ohio, 319.)

[12] Thimmelthorp's Case, Noy, 64.

[13] Nichols *v.* Badger, Cro. Eliz. 348; see *ante*, § 144, subd. *j*.

cut his own throat, and thou beginnest with no man but thou undoest him;[1] drunkenness;[2] he got drunk on Christmas day.[3]

§ 175. With respect to a charge of having a disease, it is actionable to charge one with having the venereal disease,[4] or gonorrhœa,[5] or leprosy,[6] or *semble*, falling sickness,[7] but not the itch or small-pox,[8] or with being insane,[9] unless it affects him in his business.[10] To call one leprous knave was held actionable.[11] But it has been held not actionable to charge one with *having had* any of the diseases above indicated;[12] thus it was held not actionable to say of one, Thou art a base fellow and *hadst* [*or*, hast had] the French pox,[13] or to say of a woman, "I have kept her common these seven years, she hath given me

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[1] Anon. Dal. 89.

[2] Buck *v.* Hersey, 31 Maine, 558; O'Hanlon *v.* Myers, 10 Rich. Law (So. Car.) 128. But held actionable when charged against a preacher or settled minister (McMillen *v.* Birch, 1 Binn. 178; Chaddock *v.* Briggs, 13 Mass. 248), or a female, (Brown *v.* Nickerson, 5 Gray, 1), or a master mariner in command of a vessel. (Irwin *v.* Brandwood, 2 Hurl. & C. 960.) There is a statute by which conviction of drunkenness deprives a master mariner of his certificate.

[3] Warren *v.* Norman, Walker, 387.

[4] Bloodworth *v.* Gray, 7 M. & G. 334; 8 Sc. N. S. 9; Goldman *v.* Stearns, 7 Gray, 181; Williams *v.* Holdridge, 22 Barb. 398; Hewit *v.* Mason, 24 How. Pr. R. 366; Vin. Abr. Act. for Words, D. *a.* 56; H. *a.* 3, 4, 5, 9; U. *a.* 15; Nichols *v.* Guy, 2 Carter, 82.

[5] Watson *v.* McCarthy, 2 Kelly, 57; Williams *v.* Holdridge, 22 Barb. 398.

[6] *Id.*

[7] Spoken of a lawyer. (Taylor *v.* Perkins, Noy, 117.)

[8] See Villers *v.* Monsley, 2 Wils. 403, and notes 2, p. 170 *ante*, and 3, p. 248, *post.*

[9] Joannes *v.* Burt, 6 Allen (Mass.), 236.

[10] Morgan *v.* Lingen, 8 Law Times, N. S. 800.

[13] Taylor *v.* Perkins, Cro. Jac. 144.

[11] Carslake *v.* Mapeldora, 2 T. R. 474; Bloodworth *v.* Gray, 7 M. & G. 334; 8 Sc. N. S. 9; Pike *v.* Van Wormer, 5 How. Prac. R. 171.

[12] Smith's Case, Noy, 157; Dutton *v.* Eaton, All. 31. But in Miller's Case, Cro. Jac. 430, the words Mrs. Miller is a whore, and *hath had* the pox, were held actionable. So were the words "She went to the spa to be cured of the French pox." The words imply she had that disease. (Hobson *v.* Hudson, Sty. 199.)

the bad disorder, and three or four other gentlemen."[1] The reason assigned for these decisions is, that to charge the having such a disease is actionable because the disease, being contagious, the *having* it renders the person an improper member of society, but there is no reason why the company of a person who *has had* a contagious disease should be avoided; and therefore, to say one *has had* such a disease is not actionable. A distinction is taken between having had a disease and having been guilty of a crime, the stain of which remains.[2] These decisions assume that it is the fact of the disease being *contagious* which renders the charge of having it, actionable. We are not satisfied that this assumption is warranted. The charge of leprosy certainly involved more than a mere charge of having a contagious disease. The leper lost his civil rights and all ecclesiastical privileges, he was at once cast off by society and excommunicated by the church. The physician held out to him no hope of being cured, and the priest no hope of being saved; and, besides, leprosy impeded the descent.[3] And there was a writ *de leproso amovendo* commanding the sheriff to remove him to a solitary place. Even at this day, in those countries in which leprosy prevails, the slightest ascertained taint of the disease entails upon the sufferer a compulsory exclusion tantamount to banishment from the rest of the community, or even to perpetual detention in a lazaret; yet, strange to say, it seems, that leprosy is not a contagious disease,[4] although beyond doubt it was so esteemed at

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[1] Carslake *v.* Mapeldora, 2 T. R. 473.

[2] There is this difference of scandal in the past tense, when it touches the mind and when it touches the body. If it be a scandal to the mind, and the affections as perjury, felony, &c., then the mind that remains is slandered; but if it be of an *accidental* infirmity or disease of the body, it is otherwise, for none now will forbear his company, though he had the plague in times past. (Coke, Ch. J.; see Smith's Case, Noy, 157; Dutton *v.* Eaton, All. 31.) As to charges in the past tense, see § 158, *ante*.

[3] Hale's Hist. Com. Law, ch. VI.

[4] Report on Leprosy by the Royal College of Physicians, prepared for Her Majesty's Secretary of State to the Colonies. (London, 1867.)

the period when the *dicta* we have above referred to were pronounced. The charge, too, of having the *lues venerea*, was something more than a charge of having a contagious disease, at least it involved a charge of lewdness. That the bare fact of the disease being contagious was not the ground for making the charge actionable, seems to be apparent from this: *Lues venerea*, vulgarly called pox, was formerly called the French pox, or the great pox, to distinguish it from *variola* or small-pox. Now the small-pox is a contagious disease, but it has never been held actionable to charge one with having the "small-pox," and we find in the reports that when the charge was simply of having the pox—without any other words or facts—to indicate that the French pox was intended, the charge was held not actionable.[1] To such an extent was the distinction carried that where the charge was simply of having the pox, it was held the meaning of French pox could not be given to the word by an innuendo, without an averment which warranted it.[2] Notwithstanding the *dicta* above referred to, probably a better reason for holding actionable a charge of having the leprosy or *lues venerea* is that those diseases are supposed to be ineradicable from the system, and their taint hereditary.[3] But if this

[1] It was held not actionable to say of a man, Hang him, he is full of the pox (Bonner's Case, 4 Coke, 17), or of a woman, You are a pocky whore, go to the leech [doctor] for the pox (——— *v.* Farm, Vin. Abr. Act. for Words, Y. *a.* 23), or, Thou art a scurvy pocky whore (Hunt *v.* Jones, Cro. Jac. 499), because it was not apparent that French pox was intended, but it was said in another case that when the word pox was coupled with the word whore, the French pox would be intended (Sid. 50; Clifton *v.* Wells, 12 Mod. 633; Garford *v.* Clark, Cro. Eliz. 857; and see note 2, p. 233, *ante*). So saying of one, He *caught* the pox, was held not actionable, as not implying the French pox, but saying he got the pox by a yellow-haired wench (Sym *v.* Hockley, Sid. 324), or, He is rotten with the pox (Davies *v.* Taylor, Cro. Eliz. 648), or, Thy pocky wife, her nose is eaten with the pox (Brooke *v.* Wise, Cro. Eliz. 878), or, The pox haunts you twice a year (Preckington's Case, Vin. Abr. Act. for Words, Y. *a.* 17), or, You were laid for the pox (Austin *v.* White, Cro. Eliz. 214), or, Thou art burnt and has the pox (Box's Case, Cro. Eliz. 2), was held actionable because French pox is implied. Webster, in his Dictionary, says that the word pox, without an epithet, imports *lues venerea*.

[2] Bonner's Case, Mo. 573; 4 Coke, 17.

[3] See Report from Select Committee of House of Lords on the Contagious Diseases

reason were the true one, then the charge of *having had* should be actionable equally with a charge of *having* such a disease. If, indeed, the disease be ineradicable, then to have had it, is always to have it, and language charging the having had such a disease should be actionable.

§ 176. What language published in writing concerning an individual as such, is actionable *per se?* That language in writing is actionable *per se* which denies "to a man the possession of some such worthy quality as every man is *a priori* to be taken to possess,"[1] or, which "tends to bring a party into public hatred or disgrace,"[2] or "to degrade him"[3] "in society,"[4] or, expose him to "hatred, contempt or ridicule,"[5] or "which reflects upon his character,"[6] or "imports something disgraceful to him,"[7] or "throws contumely" on him,[8] or "contumely and odium,[9] or "tends to vilify him,"[10] or "injure his character or diminish his reputation,"[11] or which is "in-

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Act of 1866. West. Rev. July, 1869; Prostitution in relation to the National Health, West. Rev. Oct., 1869.

[1] George on Libel, 17. See § 21, *ante.*

[2] Tenterden, Ch. J., Woodard *v.* Dowsing, 2 Man. & Ry. 74.

[3] Holroyd, J., *Id.*

[4] Bayley, B., Forbes *v.* King, 1 Dowl. 627.

[5] Parmiter *v.* Coupland, 6 M. & W. 105; Gathercole *v.* Mial, 15 M. & W. 319; Miller *v.* Butler, 6 Cush. 71; Shattuck *v.* Allen, 4 Gray, 540; Com'wealth *v.* Wright, 1 Cush. 46; Hillhouse *v.* Dunning, 6 Conn. 391; McGregor *v.* Thwaites, 3 B. & C. 24; Clement *v.* Chivis, 9 B. & C. 172; 4 Man. & R. 127; Clark *v.* Binney, 2 Pick. 113; Cooper *v.* Stone, 24 Wend. 434; Colby *v.* Reynolds, 6 Verm. 489; Johnson *v.* Stebbins, 5 Ind. 364; Lansing *v.* Carpenter, 9 Wis. 540.

[6] O'Brien *v.* Clement, 15 M. & W. 435; Johnson *v.* Stebbins, 5 Ind. 364; Adams *v.* Lawson, 17 Gratt. 250.

[7] Digby *v.* Thompson, 4 B. & Adol. 821; 1 Nev. & M. 485.

[8] Bell *v.* Stone, 1 Bos. & P. 331; Obaugh *v.* Finn, 4 Pike, 110.

[9] Riggs *v.* Denniston, 3 Johns. Cas. 198.

[10] Shipley *v.* Todhunter, 7 C. & P. 680.

[11] 2 Leighs N. P. 1360; Dunn *v.* Withers, 2 Humph. 512; Melton *v.* The State, 3 *Id.* 380.

jurious to his character,"[1] or to his "social character,"[2] or shows him to be "immoral or ridiculous,"[3] or "induces an ill opinion of him,"[4] or "detracts from his character as a man of good morals,"[5] or alters his "situation in society for the worse,"[6] or "imputes to him a bad reputation"[7] or "degradation of character,"[8] or ingratitude,[9] and all defamatory words injurious in their nature."[10] But to sustain an action for libel the plaintiff must either show special damage or "the nature of the charge must be such that the court can legally presume he has been degraded in the estimation of his acquaintances, or of the public, or has suffered some other loss either in his property, character or business, or in his domestic or social relations, in consequence of the publication.[11]

§ 177. It is actionable to charge one in writing with

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[1] Cockayne *v.* Hodgkisson, 5 C. & P. 543.

[2] 1 Am. Lead. Cas. 138; 3d Ed.

[3] The State *v.* Farley, 4 M'Cord, 317.

[4] Hillhouse *v.* Dunning, 6 Conn. 391.

[5] Young *v.* Miller, 3 Hill, 21; Quinn *v.* O'Gara, 2 E. D. Smith, 383.

[6] 1 Starkie on Slander, 169; and see Turner *v.* Merryweather, 7 C. B. 251; Wakley *v.* Healey, *Id.* 594; Gregory *v.* Reg., 15 Q. B. 957; Capel *v.* Jones, 4 C. B. 259; Prior *v.* Wilson, 1 C. B. N. S. 95.

[7] Cooper *v.* Greely, 1 Denio, 347.

[8] McCorkle *v.* Binns, 5 Binney, 340.

[9] Cox *v.* Lee, Law Rep. IV. Ex. 284.

[10] Chaddock *v.* Briggs, 13 Mass. 248. For some definitions of libel see *ante*, note to § 21; The State *v.* Avery, 7 Conn. 267; Williams *v.* Karnes, 4 Humph. 9; Clark *v.* Binney, 2 Pick. 113; Baron *v.* Beach, 5 N. Y. Legal Observer, 448.

[11] Cooper *v.* Stone, 2 Denio, 299; repeated Bennett *v.* Williamson, 4 Sand. 65. "There must be some certain or probable temporal loss or damage to make words actionable; but to impute to a man the mere defect or want of moral virtue, moral duties or obligations, which renders a man obnoxious to mankind, is not actionable. (De Grey, Ch. J., Onslow *v.* Horne, 3 Wils. 177, approved by Lawrence, J., Holt *v.* Scholefield, 6 T. R. 691.) But it is said (1 Starkie on Slander, 2), "an action lies in respect of any willful communication, *oral* or *written*, to the damage of another in law or in fact, made without lawful justification or excuse." "A person cannot say anything disparaging of another that has not a tendency to injure him morally or professionally." (Tindal, Ch. J., Doyley *v.* Roberts, 3 Bing. N. C. 835; 5 Scott, 40.)

being a villain,[1] liar,[2] rogue, rascal,[3] swindler,[4] drunkard, cuckold and tory,[5] informer,[6] the author or publisher of a libel or slander,[7] libellous journalist,[8] a hypocrite, and using the cloak of religion for unworthy purposes;[9] a miserable fellow, it is impossible for a newspaper article to injure to the extent of six cents, and that the community can hardly despise him worse than they now do;[10] or with having kidnapped a free colored man and hurried him into slavery;[11] or, paid money to procure an appointment to an office, or received money for offices;[12] or, of having

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[1] Bell *v.* Stone, 1 Bos. & P. 331.

[2] Brooks *v.* Bemis, 8 Johns. 455, approved Moore *v.* Bennett, 33 How. Pra. R. 180; and see *ante*, § 144, subd. *q.* Liar and knave, see King's Case, 4 Inst. 181. A charging that one shot out of a leather gun, meaning that he was guilty of falsehood, held actionable. (Harmon *v.* Delaney, 2 Str. 89, and *post*, note 6, p. 248.)

[3] Rogue, rascal, swindler, villain, are libellous. (Cooke on Defam. 2.) "I look upon him as a rascal," actionable. (Williams *v.* Karnes, 4 Humph. 9.) Felon, debauchee, and seducer, are actionable. (Millett *v.* Hulton, 4 Esp. Cas. 248.)

[4] I'Anson *v.* Stuart, 1 T. R. 748; see note 18, p. 239, *ante*, and note 6, p. 276, *post*.

[5] Giles *v.* The State, 6 Geo. 276. In Smith *v.* Wood, 2 Salk. 692, it is said to call a man cuckold is not an ecclesiastical slander, but to call him wittol is, for wittol imports his knowledge and consent. Shakespeare says: Wittol-cuckold, the devil himself hath not such a name. (Merry Wives of Windsor. act II, scene 2.)

[6] 2 Law Reporter, 126 (London, 1821; but see Informer, not actionable; Mawe *v.* Pigott, 4 Ir. C. L. N. S. 54).

[7] Andreas *v.* Koppenheafer, 3 Ser. & R. 255; Colby *v.* Reynolds, 6 Verm. 489; Viele *v.* Gray, 10 Abb. Prac. Rep. 1; Kerr *v.* Force, 3 Cr. C. C. 8; Russell *v.* Ligon, Vin. Abr. Act. for words, H. *a.* 27; Clark *v.* Binney, 2 Pick. 113. Held actionable to publish "a report circulated by B. (the plaintiff) against C., stating he, C., made him, B., pay a note twice, and proved by B. to be false. (Shelton *v.* Nance, 7 B. Monr. 128.) "A report has gone abroad through the instrumentality of S. W. (the plaintiff), stating that R. W. had a load of falsely-packed cotton bales, which report is a direct falsehood," was held actionable. (Woodburn *v.* Miller, Cheves, 194.) "His slanderous reports nearly ruined some of our best merchants," held actionable. (Cramer *v.* Noonan, 4 Wis. 231.) "He is a lying and slanderous rascal." (Snowdon *v.* Linds, 1 Cr. C. C. 569.) Formerly a libeler was disqualified from making a will. See Swinburne on Wills, P't 1, § 8, *et seq.*; Redfield on Wills, ch. 111, § 14 *a.*, p. 118, and the author or publisher of a libel could receive no benefit under the will of the person libelled. See Domat's Civil Law, B'k I, p't II, title 1, § 111, subd. vii. Gardiner *v.* Helvis, 3 Lev. 248.

[8] Wakley *v.* Cooke, 4 Ex. 511.

[9] Thorley *v.* Kerry, 4 Taunt. 355.

[10] Brown *v.* Remington, 7 Wis. 462.

[11] Nash *v.* Benedict, 25 Wend. 645.

[12] Weed *v.* Foster, 11 Barb. 203; and see Purdy *v.* Stacey, 5 Burr. 2698.

been deprived of the ordinances of the church;[1] or with being thought no more of than a horse-thief and a counterfeiter;[2] or, with stinking of brimstone and having the itch;[3] or, with voting twice on the same ballot for the election of State officers;[4] with infracting a patent,[5] with falsehood,[6] dishonesty,[7] moral obliquity,[8] smuggling,[9] blasphemy,[10] false swearing,[11] insanity,[12] or being fit for a lunatic

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[1] McCorkle *v.* Binns, 5 Binn. 340.

[2] Nelson *v.* Musgrave, 10 Mis. 648.

[3] Villers *v.* Monsley, 2 Wils. 403. In this case the words complained of were:

> Old Villars, so strong of brimstone you smell,
> As if not long since you had got out of hell.
> But this damnable smell I no longer can bear,
> Therefore I desire you would come no more here.
> You old stinking, old nasty, old itchy, old toad,
> If you come any more you shall pay for your board.
> You'll therefore take this as a warning from me,
> And never enter the doors while they belong to I. P.

[4] Walker *v.* Winn, 8 Mass. 248.

[5] Watson *v.* Trask, 6 Ham. 531.

[6] Cooper *v.* Stone, 24 Wend. 434; Lindley *v.* Horton, 27 Conn. 58; Woodburn *v.* Miller, Cheeves, 194; Shelton *v.* Nance, 7 B. Monr. 128, and *ante*, note 2, p. 247.

[7] Hart *v.* Reed, 1 B. Monr. 166; Taylor *v.* Church, 1 E. D. Smith, 279; s. c. on appeal, 8 N. Y. 452; Fowles *v.* Bowen, 30 N. Y. 20; and see Henderson *v.* Hale, 19 Ala. 154. Actionable to publish of one that he had been detected in cheating at cards. (Livingston *v.* Cheatham, Pamphlet Report; Holt on Libel, 239, note.) *Detected* implies guilt, *ante* § 144, subd. *u*. Where the defendant wrote concerning the plaintiff, his late servant, "He has now become so inflated with self-importance by the few hundreds made in my service, God only knows whether honestly or otherwise." There was an innuendo that defendant meant that plaintiff was dishonest in the service of defendant. The jury having found a verdict for the plaintiff, the court refused to disturb the verdict. (Clegg *v.* Loffer, 3 Mo. & Sc. 727.)

[8] Kerr *v.* Force, 3 Cr. C. C. 8.

[9] Stilwell *v.* Barter, 19 Wend. 487.

[10] Stow *v.* Converse, 3 Conn. 325, note 8, p. 272, *post*.

[11] Steele *v.* Southwick, 9 Johns. 214. The words were: "Our army swore terribly in Flanders, said Uncle Toby; and if Toby were here now, he might say the same of some modern swearers; the man (meaning A. the plaintiff) is no slouch at swearing to an old story;" *held*, that these words, if they do not import a charge of perjury, were libellous, as they held up the plaintiff to contempt and ridicule, as being so thoughtless or so criminal as to be regardless of the obligation of an oath. "I hope you will stop swearing lies about the trees. * * I advise you either to quit lying or preaching—one," actionable. (Adams *v.* Lawson, 17 Gratt. 250.)

[12] Southwick *v.* Stevens, 10 Johns. 443; Morgan *v.* Lingen, 8 Law Times Rep. N. S. 800; Rex *v.* Harvey, 2 B. & C. 258; Rex *v.* Creevey, 1 M. & S. 273; see, however, Mayrant *v.* Richardson, 1 Nott & McCord, 348.

asylum, and unsafe to go at large;[1] being guilty of gross misconduct in insulting females, &c.;[2] with want of chastity;[3] as engaged in serving writs on the anti-renters and catching Indians;[4] or for charging that the plaintiff, a married man, went through the ceremony of marriage with an actress;[5] and to publish an obituary notice of a living person, was held actionable.[6]

§ 177 *a.* Plaintiff having defendant's bond, the validity of which had been long litigated, advertised it for sale; a statement of the circumstances under which it was given, concluding with, "His object is either to abstract money from the pocket of an unwary purchaser, or what is more likely, by this threat of publication to extort money from me;" held to be actionable.[7] And held actionable to charge one with the unauthorized publication of private letters;[8] or with entering into a corrupt agreement to benefit himself at the expense of the public, and if elected to the Senate would use his influence to defeat the public interest and benefit himself;[9] or imputing to one who is an author a disregard of justice and propriety as a man, and as being infatuated with vanity, mad with passion, and the apologist from force of sympathy of another stigmatized with ingratitude and perfidy, and as having published as true statements falsified and encomiums retracted.[10] So it was held actionable to publish of one that he was

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[1] Perkins *v.* Mitchell, 31 Barb. 461.

[2] Clement *v.* Chivis, 9 B. & Cr. 172; 4 M. & R. 127.

[3] Bodwell *v.* Osgood, 3 Pick. 379.

[4] Hallock *v.* Miller, 2 Barb. 632.

[5] Rex *v.* Kinnersley, 1 W. Black. 294; and see Caldwell *v.* Raymond, 2 Abb. Pra. R. 193.

[6] McBride *v.* Ellis, 9 Rich. Law, So. Ca. 313.

[7] Robertson *v.* McDougall, 4 Bing. 670.

[8] Bacon *v.* Beach, 5 N. Y. Legal Observer, 448.

[9] Powers *v.* Dubois, 17 Wend. 63.

[10] Cooper *v.* Stone, 24 Wend. 434.

"as versatile as Monroe Edwards (a noted forger) in circumventing the law of right;"[1] or that he fraudulently deceived another as to a fact, so as to induce him to indorse a note for a larger sum than he intended;[2] or that he was prominent in the corrupt legislation of last winter;[3] or of one soliciting charity that she prefers unworthy claims;[4] or of one that, although aware of the death of a person occasioned by his improperly driving a carriage, he attended a public ball on the evening of the same day;[5] or of a man, that he attended a political meeting while his wife lay dead and unburied;[6] or of one who had contracted to relay a road with *new* material, that he had used *old* material;[7] and held actionable where a public officer published, in a report of an official investigation into his conduct, the following comments upon the testimony of a witness before the commissioners of inquiry: "I am extremely loath to impute to the witness, or his partner, improper motives in regard to the false accusations against me; yet I cannot refrain from the remark that, if their motives have not been unworthy of honest men, their conduct in furnishing materials to feed the flame of calumny has been such as to merit the reprobation of every man having a particle of virtue or honor. They have both much to repent of for the groundless and base insinuations they have propagated against me."[8] The de-

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[1] Cramer *v.* Noonan, 4 Wis. 231.

[2] Kerr *v.* Force, 3 Cr. C. C. 8.

[3] Littlejohn *v.* Greeley, 13 Abb. Pra. R. 41.

[4] Hoare *v.* Silverlock, 12 Q. B. 624.

[5] Churchill *v.* Hunt, 1 Chit. R. 480.

[6] The People *v.* Atkins, 42 Verm. 252.

[7] Baboneau *v.* Farrell, 27 Eng. Law & Equity R. 339; 15 Com. B. 360; 24 Law Jour. R., N. S., C. P. 9; 1 Jur. N. S. 114.

[8] Clark *v.* Binney, 2 Pick. 113. It was held actionable to publish, If any person can ascertain that I. D. (the plaintiff) was married previous to 10 August, 1799, with an innuendo meaning that he was married prior to the date mentioned, and had another wife living, he being then married to E. his present wife. (Delaney *v.* Jones, 4 Esp. 191.)

fendant wrote a letter, in which, referring to plaintiff, he said: "D. keeps a well-spread table, but I always consider myself in a family hotel when my legs are under his table, for the bill is sure to come in sooner or later, though I rarely dabble in the mysteries of *écarté* or any other game. The fellow is as deep as Crockford and as knowing as the Marquis." This language was held libellous.[1] So this language was held actionable: "As you will make considerable by being summoned to court, I will advise you to go and pay George Bowman the balance you owe him for his wild hogs you killed."[2] Where the declaration set out a letter addressed by defendant to the clerk of the board of guardians of a poor-law union, in respect of an allowance ordered by said board toward the maintenance of the mother of plaintiff and defendant, the letter stated that the plaintiff "has for years, without the slightest cause, systematically done everything she can to annoy me (defendant), and I am sorry to say my mother is only too glad to assist her. Some years ago they dragged me into chancery, and almost every term I am obliged to appear by counsel before the Vice-Chancellor. They had no business to include me in the bill, as I make no claim to my late father's property. But of course it is a pleasure to my mother and Miss Fray (plaintiff) to put me to all the expense they can. Doubting as I do my mother's extreme poverty, I think the proper test of it is an order for the workhouse, the expense of which should be borne proportionately by all her children; and as Miss Fray (plaintiff) is a lady of independence, and a single woman, and can find the money for carrying on all sorts of law proceedings, she should not be exempted," held, on demurrer, that the declaration disclosed a cause of action.[3] And so where the defendant

[1] Digby *v.* Thompson, 4 B. & Adol. 821.

[2] Adams *v.* Lawson, 17 Grat. 250.

[3] Fray *v.* Fray, 34 Law Jour. C. P. 45. It may interest some of our readers to know that the plaintiff, a lady, argued the demurrer in person.

wrote and published of the plaintiff, a hotel and job coach proprietor by trade, and a Presbyterian by religion, that from mere motives of intolerance he had refused the use of his hearse for the funeral of his deceased servant, because the body was about to be interred in a Roman Catholic cemetery, held, overruling a demurrer to the declaration, that the court could not so clearly see that the language might not be actionable as to justify the withdrawal of the case from a jury.[1] And as a rule the court on demurrer will not construe the words *mitiori sensu*, but will see if there is anything in the language which by a reasonable intendment is actionable.[2]

§ 178. It is not actionable to charge one in writing with a breach of conventional etiquette,[3] or with an intention to put money into Wall street for shaving purposes,[4] or of having brought suit against one's mother-in-law.[5] So the words, "the Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room," published by posting a paper on which they were written, purporting to be a regulation of a particular society, held not to be actionable.[6] It was held not libellous to pub-

[1] Teacy *v.* McKenna, 4 Ir. R. C. L. 374.

[2] Mawe *v.* Pigott, 4 Ir. R. C. L. 54; *ante*, note 2, p. 182.

[3] Clay *v.* Roberts, 8 Law Times, N. S. 397; 9 Jur. N. S. 580. The charge was that plaintiff, an allopathic physician, met homœopathists in consultation, and that in the opinion of the profession it was improper so to do, and against etiquette; and, further, that in the opinion of the profession it was disgraceful for an allopath to meet a homœopath in consultation.

[4] Stone *v.* Cooper, 2 Denio, 293.

[5] Cox *v.* Cooper, 9 Law Times, N. S. 329. Defendant published in a newspaper as a report of a proceeding in court; C. *v.* G. When this cause was called, the plaintiff was not in court, upon which A., who appeared for the defendant (the plaintiff's mother-in-law), applied for costs, which were allowed, and the case struck out. The declaration alleged that it did not appear by the proceedings in court that the defendant was plaintiff's mother-in-law, and that that fact was maliciously stated to create an unfavorable impression against plaintiff, and a suspicion of him, and that he ought to be regarded with suspicion of being guilty of something wrong in suing his mother-in-law, but held no cause of action disclosed.

[6] Robinson *v.* Jermyn, 1 Price, 11.

lish of one who was a druggist, "The above druggist refusing to contribute his mite with his fellow merchants for watering Jefferson avenue, I have concluded to water the avenue in front of his store for one week."[1] And held not actionable to publish of one that was engaged in a "gambling fracas" arising out of a dispute at *play*, there being no averment that illegal play was intended.[2] Where a paragraph in a newspaper merely stated that a bill had been drawn, and that the acceptance had been forged or obtained by fraud, but threw no imputation on the drawer (the plaintiff), nor insinuated that the plaintiff had practised the fraud or committed the forgery, it was held not to amount to a libel on the plaintiff.[3] And where it was stated that the plaintiff purchased a newspaper and gave his note for it; that he was unable to pay the note, and begged for delay; and that subsequently, when sued upon it, he pleaded the statute of limitations successfully; held that, there being no charge of dishonesty, the publication was not libellous.[4] So where the defendant published of the plaintiff that he was "a purse-proud aristocrat;" that he desired to put down the United States Bank to make stock held by him in other banks more valuable; that he was an office-holder, and that he wanted to increase his means by oppressing the farmer and mechanic; that he attacked Mr. Webster to gratify his propensity for misrepresentation with other charges. On demurrer to the declaration, the court held that there

[1] The People *v.* Jerome, 1 Manning's Mich. R. 142.

[2] Forbes *v.* King, 1 Dowl. 672.

[3] Stockley *v.* Clement, 4 Bing. 162.

[4] Bennett *v.* Williamson, 4 Sand. 60. The author was of counsel with the plaintiff in this case, and believes the decision has never been regarded as authoritative. In Cox *v.* Lee, Law Rep. IV. Ex. 284, the charge was somewhat similar to that in Bennett *v.* Williamson, and a verdict for the plaintiff was upheld. Where the charge was, "This Major Noah, the knight of the broken seal, who converted to his own use property known to be stolen, meaning he obtained possession of a political letter addressed to another person, which he had published," the jury failed to agree. (Noah's Case, 3 City Hall Recorder, 18.) Opening a letter and detaining it merely from curiosity or political motives, held to be a trespass only, and not a felony. (Rex *v.* Godfrey, 8 C. & P. 563.)

was nothing in this language "calculated *seriously* to degrade "plaintiff, and allowed the demurrer.[1] Defendant wrote of plaintiff, an attorney: "I will give you an anecdote of R. (plaintiff), as told to me. W., who was considered an opulent farmer, and thought himself such, sent for R. to make his will, which he did, and bequeathed to his wife and family £7,500. R. attended the opening of the will. The family were pleased, when lo, and behold! and now comes the tale. R. produces a bill for £7,500 for business done for the last fifteen years, pounces on the property, and possesses every shilling to this day. So the story has been told to me." On demurrer to the declaration, held by the majority of the court that the language was not libellous.[2]

§ 179. There is a distinction as to its actionable quality between language concerning an individual as such, and language concerning one in certain capacities or special characters. Heretofore in this chapter the attention has been solely directed to language concerning an individual as such; we have now to consider what language concerning one in certain acquired capacities or special characters is actionable *per se?* Language which is actionable, if published of an individual as such, does not cease to be actionable because published of one in a special character; and all language which is actionable as concerning an individual as such, must also be actionable when it concerns him in any special character of the kind presently to be mentioned. Our present inquiry is limited to that language which, not being actionable when published of an individual as such, becomes actionable when published, and because it is published, of him in some special character or relation. The effect of the special character of the publisher, and of the person to whom the publication is made, will be considered under the head of defences. Where the language is actionable as concerning an in-

[1] Tapham *v.* Wilson, 7 Ham. 190. This case cannot be regarded as an authority.
[2] Reeves *v.* Templar, 2 Jur. 137.

dividual as such, it is unimportant and unnecessary, except in some cases as affecting the amount of damages, to inquire further whether such language is also actionable as concerning him in some special character; as thus, where an action was for language alleged to be concerning the plaintiff generally and concerning him as an attorney, the language being actionable as concerning the plaintiff generally, it was held that he might sustain the action without proof of his being an attorney.[1]

§ 180. The distinction maintained between oral and written language, as regards its actionable quality when published concerning an individual as such, is not recognized in regard to language concerning one in a special character. As respects language concerning one in a special character, it makes no difference, as we suppose, in regard to its actionable quality, whether it be published orally or in writing.[2] Because the language in writing which concerns one in a special character, is usually actionable when published concerning the individual as such, and without reference to his special character; it is almost exclusively in respect to oral language that questions arise as to whether it is or is not actionable as affecting one in a special character.

§ 181. In connection with our present inquiry, it must be remembered that no special character which one may occupy can enhance his rights to protection, for that would be in derogation of the rule to which reference has heretofore been made (§ 138). Whatever may be the special character, the right must be the same as the right of every other individual, the right that no one shall, without legal excuse, publish language concerning another or the affairs

[1] Lewis *v.* Walter, 4 D. & Ry. 810; Harwood *v.* Astley, 1 B. & P. 87.

[2] Holt on Libel, 218. But he adds, "though defamation when written may be actionable under certain circumstances when the same words if spoken would not." See in note to § 18, *ante*, and note, p. 256, *post*.

of another which shall occasion him damage (§§ 70, 49), that is, pecuniary loss. But although one by virtue of his special character has no right superior to that of an individual as such, and who does not possess any special character, yet it must be obvious that one may occupy a position in society which will render it easier to occasion him damage than to occasion damage to one not so situated. The position of a person may render him peculiarly obnoxious to injury. It is this special susceptibility to injury alone, that creates the distinction between the actionable quality of language when it concerns one in a special character and when it concerns him only as an individual. It is not every special character the possession of which renders its possessor more than ordinarily susceptible to injury by language, and this being so we have to ascertain which are the special characters that have such an effect. It is not possible to particularize the special characters which entail this greater degree of liability to injury, but it may be stated generally that every legal occupation or position from which pecuniary benefit may or possibly can be derived, will create in the follower of such occupation, or the holder of such position, that peculiar or special susceptibility to injury by language to which reference has already been made; and hence results this rule, that language concerning one in any such lawful occupation or position may, as a necessary consequence, occasion him damage which would not have that consequence if it concerned him as an individual merely; and therefore, as heretofore (§ 132) observed, language which would not be actionable if it concerned only an individual as such, may be actionable if it concerns him in his special character.[1] The rule which makes language

[1] Brown *v.* Smith, 13 C. B. 596. "For the reason that from the nature of the case it is evident damage must ensue." (McMillen *v.* Birch, 1 Binn. 178.) "The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person; and if bare words are so, it will be

concerning one in a special character sometimes actionable, when the same language concerning one as an individual merely would not be actionable, is in reality nothing more than a phase of the rule (§ 134) that language connected with any fact affecting its meaning or effect, must be construed in connection with such fact. The language being connected with the fact of the special character of the person whom it concerns, must be construed in reference to such special character.

§ 182. Limiting ourselves for the present to occupations, we conclude that subject only to the conditions (1) that the occupation is one in which a person may lawfully be engaged, and (2) that it is an occupation which does or reasonably may yield, or may be expected to yield, *pecuniary* reward, there is no employment—call it business, trade, profession or office, or what you will[1]—so humble or so exalted but that language which concerns the person in such his employment will be actionable, if it affects him therein in a manner that may, as a necessary consequence, or does as a natural and proximate consequence, prevent him deriving therefrom that pecuniary reward which probably he might otherwise have obtained.[2] West ate the rule much broader than usual. Ordinarily it is said that the language must concern one in his business, profession, or office, and then is discussed what occupations are comprised within the terms business or profession, and what kind of office is intended. In one case[3] it was said *obiter*

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stronger in the case of a public newspaper which is so diffusive." (Harman *v.* Delany, 2 Str. 898.) "In case of slander of a person in the way of his trade, the fact of his being in trade stands in the place of special damage." (Williams, J., Rolin *v.* Steward, 14 C. B. 603.)

[1] Business includes trade and more. "Trade has a more restricted meaning than business." (Harris *v.* Amery, Law Rep. II, 154, C. P.) The words Business embraces everything about which a person can be employed. (Parker Mills *v.* Com'rs of Taxes, 23 N. Y. 244.)

[2] Foulger *v.* Newcomb, Law Rep. II, 327, *Ex.* See note 1, p. 258, *post.*

[3] Wharton *v.* Brook, 1 Vent. 21. Where I. S. said to A., who kept a stable and

that to call a woman who taught children to read and write (a school-teacher or school-mistress) a whore was not actionable, because she was not in a *business* or *profession*. For the same reason, Lord Hale, in another case, was for denying the right to recover to a *letter-carrier* charged with breaking open letters. The tenor of his Lordship's remarks was that if such an action could be maintained, a man should not speak disparagingly of his cook or his groom but an action would be brought.[1] It was said of a renter of tolls that he was not in a business or profession in which he could be slandered or libelled,[2] and the like was held of a stock broker.[3] On the other hand, it has been held that the business need not be one which renders him who follows it liable as a trader to the bankrupt law,[4] and that the same rule applies to a mere trader or retail dealer as to a merchant.[5] It was supposed

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received horses at livery (a livery-stable keeper), "Thou buyest nothing but rotton hay to poison men's horses," it was held that A. could not maintain an action therefor because he was not of any trade allowed in law. (Jones *v.* Joice, Vin. Abr. Act. for Words, U. *a.* 7.) Livery-stable keeping is recognized as a business in which one may be libelled. See Southam *v.* Allen, Raym. 231; Alexander *v.* Angle, 1 Cr. & J. 143.

[1] 1 Vent. 275. "The humility of the employment or occupation seems no objection to the action, either in law or in reason." (1 Starkie on Slander, 128; and see Cooke on Defam. 21; Terry *v.* Hooper, Lev. 115.) The courts have not one rule for one individual, and a different rule for another, or one for the rich and another for the poor. (Rex *v.* L'd Cochrane, 3 Maule & S. 10; Sinclair *v.* Charles Phillipe, 2 B. & P. 363.) In Cockaine *v.* Hopkins, 2 Lev. 214, the plaintiff alleged that he used the art of buying and selling and gained great profit thereby, and that defendant said of him, He is a *runagate*, whereby he, plaintiff, lost his customers, but did not allege special damage; after verdict for plaintiff, judgment was arrested because, as the court said, runagate was not equivalent to bankrupt, and as plaintiff did not allege what trade he followed, it might be a *tinker* or *pedlar*, who is a rogue by statute. This presuming that plaintiff's trade is unlawful was done in Morris *v.* Langdale, 2 Bos. & Pul. 284; but at this day the presumption would be the other way. See *post*, note 4, p. 260.

[2] Bellamy *v.* Burch, 16 M. & W. 590; and see Sellars *v.* Killew, 7 Dowl. & R. 121; 4 B. & C. 55.

[3] Morris *v.* Langdale, 2 Bos. & Pul. 284.

[4] Whitaker *v.* Bradley, 7 D. & R. 649; S. C. Whittington *v.* Gladwin, 5 B. & C. 180; 2 Car. & P. 146.

[5] Gates *v.* Bowker, 8 Verm. (3 Wash.) 23; Ostrom *v.* Calkins, 5 Wend. 264; Carpenter *v.* Dennis, 3 Sandf. 305.

formerly that the rule was limited to occupations by which the person whom the language concerned obtained his livelihood or "daily bread;" but such a limitation, if it ever existed, no longer prevails. It is now held to be sufficient if the person whom the language concerns habitually (as distinguished from occasionally) acts in or pursues the occupation to derive an emolument from it.[1] Where it was objected against the plaintiff's right to recover that it was not alleged he got his living by his occupation, the objection was overruled.[2]

§ 183. We mentioned in the last preceding section (§ 182) as one of the conditions to the right of action for language concerning one in his occupation, that the occupation must be a lawful one. It is a universal rule, of which very numerous examples are to be found in the reports, that one engaged in an unlawful pursuit cannot recover for work done or goods sold by him, nor for any injury he may sustain in such occupation;[3] hence, for language concerning a person in an unlawful occupation, an action is not maintainable. Thus it was held that pugilistic exhibitions being illegal, one could not maintain an action for language affecting him as proprietor of a tennis court where such exhibitions were made;[4] and *semble* one who

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[1] Baboneau *v.* Farrell, 15 C. B. 360; Bryant *v.* Loxton, 11 Moore, 344; Davis *v.* Davis, 1 Nott & M'C. 290. "The action seems to extend to words spoken of a person in any lawful employment in which he may gain his livelihood." (1 Starkie on Slander, 127.) "It does not appear to be necessary that the party should gain his living in the character to which the slander is applied, but it is sufficient if he habitually act in that character and derive emolument from it. (*Id.* 129.)

[2] Dobson *v.* Thorstone, 3 Mod. 112.

[3] Timmerman *v.* Morrison, 14 Johns. 369; Allcott *v.* Barber, 1 Wend. 526; Smith *v.* Tracy, 2 Hall, 465; Bailey *v.* Mogg, 4 Denio, 60; Finch *v.* Gridley, 25 Wend. 469; Smith *v.* Wilcox, 24 N. Y. 353; s. c. 19 Barb. 581, and 25 Barb. 341; Cundell *v.* Dawson, 4 C. B. 476; Best *v.* Bauder, 29 How. Pr. R. 489; Ferdon *v.* Cunningham, 20 *id.* 154; Cope *v.* Rowland, 2 M. & W. 149; Smith *v.* Mawhood, 14 M. & W. 452; Seneca County B'k *v.* Lamb, 26 Barb. 595; Barton *v.* Port Jackson Plank Road, 17 Barb. 397; Griffith *v.* Wells, 3 Denio, 227; Bell *v.* Quinn, 2 Sandf. 146; Taylor *v.* Crowland Gas Co., 10 Ex. 293; 18 Jur. 913; 26 Eng. Law & Eq. R. 460; Cowan *v.* Milbourn, 2 Law Rep. 230, Ex.; 2 Pars. on Cont. 259; Story on Contr. 620.

[4] Hunt *v.* Bell, 1 Bing. 1.

practices as a physician without being duly licensed cannot maintain an action for language concerning him as a physician.[1] The fact, however, that a person is engaged in an unlawful occupation is no reason for his not being allowed his action for any language concerning him as an individual, or concerning him in any other and lawful occupation in which he may be engaged.[2] If the language be actionable as concerning the person as an individual merely, it is unimportant and unnecessary to inquire further whether he is in any or in what occupation, legal or otherwise.[3] If the illegality of the occupation proceeds from the fact that the person following it is not duly licensed, the burden is on the publisher to show that the person whom the language concerns was unlicensed.[4]

§ 184. As to the kind of office which one must hold to render actionable language which concerns him in such office, it is laid down by Starkie, but as we conceive erroneously, that "words are equally actionable, whether the office be lucrative or merely confidential."[5] Pecuniary loss is the gist of the action for slander or libel (§ 57); and as no pecuniary loss can result from language concerning

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[1] Marsh *v.* Davison, 9 Paige, 580, referring to a statute since repealed.

[2] Yrisarri *v.* Clement, 2 C. & P. 223; 3 Bing. 432; 11 Moore, 308; Greville *v.* Chapman, 1 D. & M. 553; Cheney *v.* Goodrich, 98 Mass. 224. In Manning *v.* Clements, 7 Bing. 362; 5 M. & P. 211, the plaintiff alleged he was a manufacturer of bitters, and defendant was allowed to introduce evidence of the illegality of such manufacture (namely, that the alleged bitters were another and a prohibited article), not as a justification, but in contradiction of plaintiff's allegation.

[3] Harwood *v.* Astley, 4 Bos. & P. 47; Lewis *v.* Walter, 4 D & Ry. 810.

[4] Fry *v.* Bennett, 28 N. Y. 324; Smith *v.* Joyce, 12 Barb. 25. See note 3, p. 268.

[5] 1 Starkie on Slander, 119. He states that the whole class of cases in which recovery has been had for words affecting one in office not lucrative, "seems to rest on more dubious principles than any other." At page 122 he says—erroneously as we conceive—"the danger of exclusion from office gives rise to the action." And at page 118 he says the ground of action is "somewhat different" according as the office is confidential or lucrative. And at page 124 he says "the action appears to extend to all offices of *trust* or profit without limitation, provided they be of a *temporal* nature." This word *temporal* is used as the converse of *spiritual*, to exclude the ecclesiastical jurisdiction.

one in an office which yields no pecuniary emolument, words not otherwise actionable cannot become so because they concern one in such an office.[1] Whatever may have been the doctrine and practice of the Court of the Star-Chamber, or of the common law courts under the statutes *scandalum magnatum*, we believe that no court proceeding according to the common law, and independently of any statute, has sanctioned the doctrine as laid down by Starkie. Wherever language concerning one in an office merely honorary has in a common law court, and independently of any statute, been held actionable, it will be seen that the language would have been actionable had it been published of an individual as such.

§ 185. Another relation or special character in which one may be injuriously affected by language, is that of partner. Language may concern partners or one or some of several partners in their or his individual capacity merely, or it may *touch* them or him in their or his partnership business. As respects language concerning one who is a partner, and which concerns him as an individual merely, the fact of his being a partner, unless, perhaps, as affecting the damages, has no significance. Language concerning partners in their partnership business may be actionable *per se*, or actionable only by reason of the special damage. That language touching the business which would be actionable *per se* if published concerning one who is not a partner, would be actionable *per se* as concerning partners or one who is a partner. Actionable language concerning partners, and which touches them in

[1] Gallwey *v.* Marshall, 9 Ex. 294. In that action the language (oral) imputed incontinence to a clergyman. The court, in deciding against the plaintiff, said: We should have no doubt of the plaintiff's right to recover if the declaration had averred that he was *beneficed*, or was in the actual receipt of professional *temporal emolument*, * * as the charge would have caused the loss of the benefice or the emoluments. In the absence of any averment of plaintiff having any office of temporal (pecuniary) profit, we are not satisfied this action will lie. There is no authority that it will where there is no actual damage.

their partnership business, is an injury to their joint business, and is a joint and several injury, for which both may sue jointly or either may sue separately. Thus where the language imputed to two persons, who were partners as wool-staplers, that they had been guilty of fraud in a sale of wool, and they sued jointly, alleging special damage to their trade, the action was sustained.[1] For words charging partners with making an assignment to defraud their creditors, an action by one partner was allowed;[2] and where the *firm* was charged with insolvency, the language used being "J. T. & Co. are down," held a joint action might be maintained.[3] In such a joint action no damages are recoverable for the injury to the feelings of the partners.[4] Where language concerns one only of several partners, but touches him in his partnership business, there is an injury to the partnership business, for which the partner whom the language concerns may sue alone, or all the partners may unite with him. Thus where the language was of one of several partners as bankers, and imputed to him insolvency, and for this he alone brought suit alleging damage to the partnership business, it was pleaded in abatement that the plaintiff carried on his business jointly with A. B., and that the alleged damage accrued to A. B. jointly with the plaintiff. On general demurrer the plea was overruled, but a question was raised whether a special demurrer might not have been interposed to the declaration for uniting damages which accrued to the plaintiff with damages which accrued to his partner. In other words, as the damage to the business was jointly to the plaintiff and his partners, was it proper for plaintiff

[1] Cook *v.* Batchelor, 3 Bos. & Pul. 150; see note to Goldstein *v.* Foss, 2 Car. & P. 252.

[2] Odiorne *v.* Bacon, 6 Cush. 185.

[3] Titus *v.* Follett, 2 Hill, 318; and see Foster *v.* Lawson, 3 Bing. 452; Le Fanu *v.* Malcomson, 1 Cl. & Fin. N. S. 637; Maitland *v.* Goldney, 2 East, 426; Beardsley *v.* Tappan, 1 Blatch, C. C. Rep. 588. See *Corporations*.

[4] Haythorn *v.* Lawson, 3 Car. & P. 196.

to allege them in his declaration? It was assumed that on the trial the jury would separate the damages;[1] and in other cases, one of several partners sustained an action for libel on him in his business.[2] Where the language published purported to give information as to the credit and standing of a mercantile firm, and charged one member with dishonesty, a joint action by all the partners was sustained.[3] Where the partners unite in the action, or where the partner whom the language concerns sues alone, in either case the language being of the kind called actionable *per se* (§§ 146, 147), the action may be maintained without any allegation or proof of special damage;[4] but where a partner whom the language does not personally concern sues alone for language personally concerning his partner, in that case the action cannot be maintained unless there be an allegation and proof of special damage. A recovery by the partner whom the language personally concerns would not bar an action by his partner, and probably would not bar a separate action by all the partners; nor would a recovery by all the partners be a bar to a separate action by the partner whom the language personally concerns.[5]

§ 186. The circumstance of one being heir presumptive has been held to give an actionable quality to language concerning him in that character. Starkie devotes a chapter to a partial review of the cases in which, on the ground that it may cause his disinherison, it has been held actionable to call a presumptive heir bastard, and he concludes

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[1] Robinson *v.* Marchant, 7 Q. B. (Adol. & Ell. N. S.) 918.

[2] Fidler *v.* Delavan, 20 Wend. 57; and see Solomon *v.* Medex, 1 Stark. Cas. 191; Harrison *v.* Bevington, 8 Car. & P. 708, and Davis *v.* Ruff, Cheves, 17. This last-named case is commented on in Taylor *v.* Church, 1 E. D. Smith, 287.

[3] Taylor *v.* Church, 1 E. D. Smith, 279; s. c. 8 N. Y. 452.

[4] *Id.;* 2 Saund. Pl. & Ev. 117 *a.* 117 *b.* 6 ed.; and see Foster *v.* Lawson, 3 Bing. 452; 11 Moore, 360.

[5] Taylor *v.* Church, 1 E. D. Smith, 287.

that, although such decisions carry the doctrine of presumptive loss to a great extent, they seem to be warranted by the application of sound and general principles. He does not state what those principles are, and for ourselves we can discover no principle which will support such decisions. It certainly is not a *necessary* consequence that one should disinherit his presumptive heir because it has been said of him that he is a bastard.

§ 187. One being a candidate for an office or for employment does not have the effect to make language concerning him in that character actionable *per se*, otherwise than as it would be actionable *per se* if it concerned him as an individual merely.[1] If the language concerning a candidate for office or employment occasions him special damage, as the failure to obtain such office or employment, it will be actionable; thus if a clergyman is to be presented to a benefice, and one to defeat him says to the patron, He is a heretic, or a bastard, or excommunicated, and he thereby loses his presentment, he may have his action;[2] and where a lawyer was a candidate for the office of steward of a corporation, and the electors being assembled to make an election, one of them said to the others, He (said candidate) is an ignorant man and not fit for the place, by means of which he was refused, the court inclined to the opinion that the words were actionable, but no judgment was given.[3] The fact of one being a candidate for an office or for employment, in many instances affords a license or legal excuse for publishing language concerning him as such candidate, for which publication there would be no legal excuse did he not occupy the position

[1] Powers *v.* Dubois, 17 Wend. 63; Prinn *v.* Howe, 1 Brown's Cas. Parl. 64; Littlejohn *v.* Greely, 13 Abb. P. R. 41; Hunt *v.* Bennett, 4 E. D. Smith, 647; 19 N. Y. 173.

[2] Davis *v.* Gardiner, 4 Rep. 17 *a*.

[3] Sanderson *v.* Ruddes, Mar. 146. Words which will cause others not to vote for him of whom they were spoken, at an election at which he is a candidate, are actionable. (Brewer *v.* Weakley, 2 Overt. 99.)

of such a candidate. The consideration of language concerning one as a candidate for office or for employment falls more appropriately under the head of legal excuses or defenses, and it will be there discussed.

§ 188. As regards the kind of language concerning one in an occupation or office which will confer a right of action, it has been said: "Words are actionable when spoken of one in an office of profit, which may *probably* occasion the loss of his office, or where spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage.[1] "If the words be of *probable* ill consequence to a person in a trade or profession or an office;"[2] Bayley, B., objected to this rule that the words *probably* and *probable* were too indefinite, unless considered equivalent to "having a *natural* tendency to," and as confined within the limits of showing the want of some necessary qualification or some misconduct in the office, it went beyond what the authorities warranted.[3] But, "How is a *natural* stronger (more definite) than a *probable* tendency?"[4] To maintain an action for words spoken, they must impute some matter in relation to the party's particular trade or vocation, and which, if true, would render him unworthy of employment.[5] "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade or business;"[6] or his office of trust and place of honor, provided they be of a temporal na-

[1] De Grey, Ch. J., Onslow *v.* Horne, 2 Wils. 186.

[2] Same case, as reported 2 W. Bl. R. 753.

[3] Lumby *v.* Allday, 1 Cr. & J. 301; 1 Tyrw. 217.

[4] Williams, J., James *v.* Brook, 9 Q. B. 7; and see Sibley *v.* Tomlins, 4 Tyrw. 90.

[5] Kinney *v.* Nash, 3 N. Y. 177; Fowles *v.* Bowen, 30 N. Y. 24.

[6] Bayley B., Lumby *v.* Allday, 1 Cr. & J. 301; 1 Tyrw. 217; approved Ayre *v.* Craven, 2 Adol. & El. 2; 2 Nev. & M. 220; and see Jones *v.* Littler, 7 M. & W. 433; Southee *v.* Denny, 1 Ex. 196; James *v.* Brooke, 9 Q. B. 7.

ture;[1] and "We ought not to extend the limits of actions of this nature beyond those laid down by our predecessors."[2] Although every lawful lucrative occupation is, as regards the actionable quality of language, governed by the same general principles, yet the kind of occupation affects the application of the principles, and the identical language which may be not actionable as concerning one in some certain occupation, may be actionable as concerning one in some other occupation. The test in every case by which to decide if the language be actionable, meaning actionable *per se*, is, does it necessarily occasion damage; and because the language which may necessarily occasion damage in one occupation will not have that effect in some other, it happens that in every case regard must be had to the character of the occupation. Numerous illustrations of this are to be found in the subsequent part of this chapter. We select one instance: In the case of a merchant, the keeping of account books is or is considered to be a requisite to the successful prosecution of his business, and therefore to charge one who is a merchant with keeping false books has been held to be actionable,[3] but the like charge concerning a farmer was held not actionable, because the keeping of books was not considered

[1] How *v.* Prinn, Holt, 652; s. c. Prinn *v.* Howe, 1 Brown's Cas. Parl. 64; 1 Starkie on Slander, 124. "A distinction is usually taken between an office of profit and an office of honor, but the distinction is not a sound one, and though it may apply to an action for words, it does not extend to an action for libel." If a person be in an office of profit, it is libellous to impute to him either inability, want of integrity, or anything which amounts to it. But if the office be an office of honor, it is said no action lies except the import of the words be a charge of dishonesty. In either case, charging a man with inclinations and principles which show him unfit for an office of trust or honor is libellous, without charging him with any act. Any imputations against a person who is in the enjoyment of an office, either public or private, of honor, profit, or trust, which imports a charge of unfitness to administer the duty of the office, are libels." (Holt on Libel, 208.) Words which charge a breach of a public trust are actionable. See Kinney *v.* Nash, 3 N. Y. 178.

[2] Pollock, Ch. B., Gallwey *v.* Marshall, 9 Ex. 294.

[3] Backus *v.* Richardson, 5 Johns. 476; and the like charge against a blacksmith held actionable. Burtch *v.* Nickerson, 17 Johns. 217; and see Crawfoot *v.* Dale, Vent. 263; and Viner's Abr. Act. for Words, U. *a.* 22.

requisite to the conduct of his business, although in addition to his business of farmer he sawed logs for reward and dealt in lumber.[1]

§ 189. One of the essential elements of the actionable quality of language concerning one in his occupation or office, is the fact that the person whom the language concerns is in such occupation or office (§ 181); it necessarily follows that to render language concerning one in his occupation or office actionable *per se*, the person whom the language concerns must follow such occupation or hold such office at the time the language is published. No language concerning one in any special character, published after he has ceased to occupy that character, can be actionable as concerning him in such special character. The general rule is that in an action for language concerning one in a special character, it must be shown that he maintained that special character at the time the language was published.[2] Where the plaintiff had been commissioner to make a treaty with the Indians, and after his commission had terminated the defendant charged him

[1] Rathbun *v.* Emigh, 6 Wend. 407. Where the defendant said of the plaintiff, a mercer, "He hath deceived in a reckoning, and his debt-book which he keepeth is a false debt-book," judgment went against the plaintiff, because the book might be kept by the plaintiff's servant, and he, plaintiff, not have knowledge of it. (Brook's Case, Godb. 231.) In Backus *v.* Richardson (5 Johns. 476), the court said the words "You keep false books" implied knowledge in plaintiff; and in Todd *v.* Hastings (Vent. 117), it was held that to charge a trader with keeping "*false books*" would be construed to mean "false *debt* books." Keeping books of account is necessary in this country, where credit is generally given, as well by the mechanic as by the merchant and professional man. (Burtch *v.* Nickerson, 17 Johns. 217.) Mechanics "generally sell on credit, and their success and reputation depend upon their character for fair dealing." (Rathbun *v.* Emigh, 6 Wend. 407.) Another reason why a charge of keeping false books of account was held actionable was, that such books, if generally reputed correct, were receivable as evidence of their contents. (Crawfoot *v.* Dale, Vent. 263.)

[2] Smayles *v.* Smith, Browl. 1; Reignald's Case, Cro. Car. 563; Bellamy *v.* Burch, 16 M. & W. 590; Allen *v.* Hillman, 12 Pick. 101; Forward *v.* Adams, 7 Wend. 204; Oram *v.* Franklin, 5 Blackf. 42; Harris *v.* Bailey, 8 N. Hamp. 216. See 2 Vent. 366, where it is said, "Where a man *had been* in an office of trust, to say he behaved himself corruptly in it, as it imported great scandal, so it might prevent his coming into that or the like office again." See § 290, *post*.

orally with hiring and bribing the Indians to sign such treaty, held that no action could be maintained.[1] Where plaintiff was twice constable, once in 1843 and again in 1846, and during the latter period one said of him orally that while constable in 1843 he had made a false return, held that the words would not support an action.[2] If a man has been a merchant and leaves off merchandising for a time, and another calls him bankrupt, an action lies; for though he does not use the trade of a merchant at the time of the speaking the words, yet he *remains a merchant*, and may resume the trade at his pleasure;[3] but where the plaintiff alleged he had for many years used the trade of a drover, but without alleging he was a drover at the time of the publication, it was held he did not show a cause of action.[4] Whether or not the plaintiff occupied the special character alleged, and whether or not he continued in such special character until the time of the publication complained against, are questions of fact. A person shown once to have been in any certain office, profession, or trade, is presumed to continue therein.[5] The decisions which

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[1] Forward *v.* Adams, 7 Wend. 204.

[2] Edwards *v.* Howell, 10 Ired. 211; but it was said plaintiff might have recovered on proof of special damage.

[3] Gardner *v.* Hopwood, Yelv. 159; and see Vin. Abr. Act. for Words, U. *a.* 19. An attorney who has not taken out his annual certificate, although he is by statute disabled from recovering his fees, nevertheless continues an attorney, and may maintain an action for language concerning him as an attorney. (Jones *v.* Stevens, 11 Price, 235; Pearce *v.* Whale, 5 B. & C. 38; Morris *v.* Langdale, 2 Bos. & P. 284.) See § 183, *ante.*

[4] Collis *v.* Malin, Cro. Car. 282; Gray *v.* Metcalfe, Yelv. 21.

[5] Tuthill *v.* Milton, Yelv. 158; Collis *v.* Malin, Cro. Car. 282; Jordan *v.* Lyster, Cro. Eliz. 273; Moore *v.* Syne, 2 Rolle R. 84; Dod *v.* Robinson, All. 63; Forward *v.* Adams, 7 Wend. 204; Bellamy *v.* Burch, 16 M. & W. 590; Fry *v.* Bennett, 28 N. Y. 324; but see M'Leod *v.* Murphy, 3 Car. & P. 311. Where a plaintiff avers generally that he filled any office, or exercised any trade, his filling such office or being of such trade is sufficiently proved by evidence of his having acted in such office or carried on such trade. And in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters without proving their appointments. (Berryman *v.* Wise, 4 T. R. 366; Gordon's case, Leach, 581; Rex *v.* Shelly, Leach, 581. *n.*)

are sometimes referred to as exceptions to the rule that the person whom the language concerns must maintain his special character at the time the language is published, are really not exceptions to that rule, they are cases which follow another and different rule because comprehended in a different class. On examination they will be found to range themselves under the division relating to language concerning an individual as such; and the true ground on which in such cases the actions were sustained, was of the language being actionable as affecting the individual as such, without regard to his having occupied the special character to which the language refers. Thus where one had been senator, and after his term of office had ceased it was published of him in writing that he had been guilty of corrupt conduct in his office of senator, the action was sustained;[1] and so where one had been a constable, and after he quitted that office it was said of him that while in office he was a healer of felons, or of one that when in office as a justice he was a bribing justice.[2]

§ 190. To render language concerning one in a special character or relation actionable, "it must touch him" in that special character or relation; for unless it does, it must be judged in regard to its actionable quality by the rules which apply to language concerning an individual as such. That the language "must touch" the person whom it concerns in his special character, means only that it must concern him in such special character, and affect him therein. It is not sufficient that the language disparages him generally, or that his general reputation is thereby

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[1] Cramer *v.* Riggs, 17 Wend. 209; and see 7 Wend. 204; Wilson *v.* Noonan, 23 Wis. 231; Littlejohn *v.* Greely, 13 Abb. Pra. R. 41; Walden *v.* Mitchell, 2 Vent. 266.

[2] Pridham *v.* Tucker, Yelv. 153; and see Herle *v.* Osgood, 1 Vent. 50. To say of a commissioner appointed to take testimony, he hath taken bribes. (Moor *v.* Foster, Cro. Jac. 65), and charging an officer of a court of record with taking bribes, held actionable. (Anon. Dal. 43; Lee *v.* Swan, Yelv. 142.)

affected; it must be such as if true would disqualify him or render him less fit properly to fulfill the duties incident to the special character he has assumed. It is not enough that the language "tends to injure the person in his office, profession, or trade, it must be spoken (published) of him in his official or business character."[1] It must "touch him in his office, profession, or trade,"[2] Thus, saying of a justice of the peace "there is a combined company here to cheat strangers, and Squire Van Tassel has a hand in it. I don't see why he did not tell me the execution had not been returned in time, so that I could sue the constable;"[3] or, "Squire Oakley is a damned rogue,"[4] was held to impute misconduct as a man and not as a magistrate, and not to be actionable. For a like reason it was held not actionable to say of one who kept a public

[1] Van Tassel *v.* Capron, 1 Denio, 250; Sibley *v.* Tompkins, 4 Tyrw. 90; Dolley *v.* Roberts, 3 Bing. N. S. 835; Ridway *v.* Gray, 31 Verm. (2 Shaw) 292; Buck *v.* Hersey, 31 Maine (1 Red.) 558. It seems, however, that where one is in business, words spoken of him in his private character will bear an action, if they are such as must necessarily affect him in his business; thus to say of a brewer, he had been locked up in a sponging-house (a private jail, kept by deputy-sheriffs where persons arrested for debt, on paying for the indulgence, have the option of remaining instead of going to the debtor's prison), was held actionable, because the words were held necessarily to affect his credit as a trader. (Jones *v.* Littler, 7 M. & W. 423.) And see Bell *v.* Thatcher, Freem. 277; Fowles *v.* Bowen, 30 N. Y. 23; Starr *v.* Gardner, 6 Up. Can. Q. B. R. (O. S.) 512. So in Davies *v.* Ruff, Cheves, 17, it is said that words affecting the pecuniary credit of a merchant need not be averred nor proved to have been used in relation to his occupation as a merchant, for in their nature they strike at the root of mercantile character.

[2] Kinney *v.* Nash, 3 N. Y. 177; Van Tassel *v.* Capron, 1 Denio, 250; Comyn's Dig. Act. for Defam. D. 27. Whether words were spoken of a man in a certain capacity, is a question of fact for the jury. (Skinner *v.* Grant, 12 Verm. 456; Sibley *v.* Tomlins, 4 Tyrw. 90; Doyley *v.* Roberts, 3 Bing. N. S. 835; Tomlinson *v.* Brittlebank, 1 Har. & W. 573.)

[3] Van Tassel *v.* Capron, 1 Denio, 250.

[4] Oakley *v.* Farrington, 1 Johns. Cas. 129; and held not actionable to say of a justice. "He is a logger-headed, a slouch-headed, and a bursen-bellied hound." (1 Keb. 629.) Calling one who is a cooper varlet and knave is not actionable—the words do not touch him in his trade. (Coles *v.* Kettle, Cro. Jac. 204.) But the words, "You are a deceitful rascal, villain, and liar; I would not trust you with an auctioneer's license. You robbed a man you called your friend, and not satisfied with £10, you robbed him of £20 a fortnight ago," spoken of an auctioneer, held actionable. (Ramsdale *v.* Greenacre, 1 Fos. & F. 61.)

garden, "He is a desperate man, a dangerous man. I am afraid to go to his house alone; I am afraid of my life;" [1] and these words of a pork butcher, "Who stole F.'s pigs? You did, you thief; you poisoned them with mustard and brimstone," were, after verdict, held not to have any necessary connection with his trade, and were not calculated to injure him in it, and therefore not actionable.[2] So these words, "He is a regular prover under bankruptcies," published of a livery-stable keeper held not to affect him in his business.[3] The words, "He has defrauded his creditors, and been horse-whipped off the course at D.," spoken of an attorney but not in his character of an attorney, held not actionable.[4] And the same decision was made in reference to these words spoken of an attorney: "I have taken out a judge's order to tax A.'s bill, I will bring him to book, and have him struck off the roll.[5] I will take him to Bow Street on a charge of forgery." [6] And saying of a livery-stable keeper, "You are a regular prover under bankruptcy; you are a regular bankrupt maker; if it was not for some of your neighbors your shop would look queer," was held not to be a charge in the way of his trade nor actionable.[7] Where words imputing incontinency and not in themselves actionable were spoken of one in respect of his situation as clerk in a gas company, held that not imputing any misconduct in his capacity of clerk, they were not actionable.[8] A charge

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[1] Ireland *v.* McGarrish, 1 Sandf. 155.

[2] Sibley *v.* Tomlins, 4 Tyrw. 90. The jury found that the words were not intended to impute felony.

[3] Angle *v.* Alexander, 7 Bing. 123.

[4] Doyley *v.* Roberts, 3 Bing. N. S. 835.

[5] Phillips *v* Jansen, 2 Esp. Cas. 624.

[6] Harrison *v.* King, 4 Price, 46; 7 Taunt. 431.

[7] Alexander *v.* Angle, 1 Cr. & J. 143: 1 Tyrw. 9.

[8] Lumby *v.* Allday, 1 Cr. & J. 301; 1 Tyrw. 217. The words were, "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores."

against the plaintiff, laid to be spoken of him in his trade of a staymaker, of criminal intercourse with a female employed by him in his trade, held not to affect him in his trade and not actionable.[1] And so it was held that a charge of adultery against a physician did not *necessarily* touch him in his profession, and was not actionable without its being shown that the charge was connected with the plaintiff's profession;[2] and the same was held of these words of a physician: "He is so steady drunk he cannot get business any more;[3] or, he is a two-penny bleeder;[4] or, he gave my child too much mercury; or, he made up the medicines wrong through jealousy, because I would not allow him to use his own judgment.[5] Saying of a woman who gained her livelihood by teaching girls to dance, "She is as much a man as I am; she got I. S. with child; she is an hermaphrodite," was held not actionable, no special damage being properly alleged, and because girls are taught to dance as frequently by men as by women.[6] It was held actionable to call a school-mistress a dirty slut;[7] or with being insane,[8] or to charge by writing a school-teacher with making a false report to the school visitors and with general untruthfulness,[9] or with want of chastity.[10] It was held actionable to say of a

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[1] Brayne *v.* Cooper, 5 M. & W. 249.

[2] Ayre *v.* Craven, 2 Adol. & El. 2; 4 Nev. & M. 229. In Parrett *v.* Carpenter, Noy, 64, it was held not actionable *per se* to charge a clergyman with adultery; but that case, it was said in Galwey *v.* Marshall, 9 Ex. 294, has been overruled; and saying of a clergyman that he had two wives was held actionable. (Nicholson *v.* Lynes, Cro. Eliz. 94.) See § 195, *post.*

[3] Anon. 1 Ham. 83, note.

[4] Foster *v.* Small, 3 Whart. 138.

[5] Edsall *v.* Russell, 4 M. & G. 1090.

[6] Weatherhead *v.* Armitage, 2 Levinz, 233. In Malone *v.* Stewart, 15 Ohio, 319, it was held actionable to call a married woman an hermaphrodite.

[7] Wilson *v.* Runyon, Wright, 651.

[8] Morgan *v.* Lingen, 8 Law Times, N. S. 800. See *ante*, note 10, p. 248; note 1, p. 249.

[9] Lindley *v.* Horton, 27 Conn. 58.

[10] Bodwell *v.* Osgood, 3 Pick. 379.

shop-keeper, he had nothing but rotten goods in his shop;[1] or to charge in writing that the place of business of a trader (a coach-builder) was not respectable;[2] or, that a ship of which the plaintiff was owner and master, and which he had advertised for a voyage to the East Indies, was not seaworthy, and that Jews had bought her to take out convicts.[3] Saying of an innkeeper, "you have stolen goods in your house and you know it," held not actionable.[4]

§ 191. In those trades or professions in which, ordinarily, credit is essential to their successful prosecution, there language is actionable *per se*, which imputes to one in any such trade or profession, a want of credit or responsibility or insolvency, past, present, or future;[5] as, to say of a tradesman, He is not able to pay his debts; or, He owes more than he is worth;[6] he will break shortly.[7] He is a pitiful fellow and a rogue; he compounded his debts

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[1] Bennett *v.* Wells, 12 Mod. 420.

[2] Barrett *v.* Long, 3 Ho. Lords Cas. 395.

[3] Ingram *v.* Lawson, 6 Bing. N. C. 212; 8 Sc. 775. The words were held to be more than a libel on the ship, and to constitute a libel on the plaintiff in his trade, for which he might recover without proof of malice or special damage.

[4] Patterson *v.* Collins, 11 Up. Can. Q. B. 63. See *ante*, note 6, p. 236.

[5] Seycroft *v.* Dunker, Cro. Car. 317; Harrison *v.* Thornborough, 10 Mod. 11; Southam *v.* Allen, T. Raym. 231; Sewall *v.* Catlin, 3 Wend. 291; Read *v.* Hudson, 1 L'd Raym. 610; Ostrom *v.* Calkins, 5 Wend. 263; Davis *v.* Lewis, 7 T. R. 17; Dobson *v.* Thornistone, 3 Mod. 112; Chapman *v.* Lamphire, 3 Mod. 155, Mott *v.* Comstock, 7 Cow. 654; Whitaker *v.* Bradley, 7 D. & R. 649; s. c., Whittington *v.* Gladwin, 5 B. & C. 180; 2 C. & P. 146; Lewis *v.* Hawley, 2 Day, 495; Anon., Lofft, 322; Hull *v.* Smith, 1 M. & S. 287; Else *v.* Ferris, Anthon, 23; Brown *v.* Smith, 20 Eng. L. & Eq. R. 243; 13 C. B. 596; 22 Law Jour. R. N. S. C. P. 151; 17 Jur. 807; 1 Com. Law Rep. 49; Jones *v.* Littler, 7 M. & W. 423; Carpenter *v.* Dennis, 3 Sandf. 305; Phillips *v.* Hoeffer, 1 Penn. St. Rep. 62; Prettyman *v.* Shockley, 4 Harring. 112; Griffiths *v.* Lewis, 15 Law Jour. 249, Q. B.

[6] Vin. Abr. Act. for Words, U. *a.* 11, 12, 13, 20, 21, and to publish in writing concerning one engaged in business in which credit was essential, "Had to hold over a few days for the accommodation of L. (plaintiff)." Lewis *v.* Chapman, 19 Barb. 252; s. c. 16 N. Y. 369; and see Robinson *v.* Marchant, 7 Q. B. 918; Marzetti *v.* Williams, 1 B. & A. 415.

[7] Hill's case, Lat. 114; Dobson *v.* Thornistone, 3 Mod. 112.

at 5*s.* in the pound.[1] He is indebted to me, and if he does not come and make terms with me, I will make a bankrupt of him and ruin him.[2] He is a bankrupt.[3] He was a bankrupt.[4] He is a bankrupt, and unable to pay his just debts.[5] The sheriff will sell him out one of these days, and claims against him not sued will be lost.[6] He must fail; his time is come.[7] He is not worth a penny and will run away.[8] He will be a bankrupt.[9] He is next door to breaking.[10] He is broken and run away, and will never return.[11] I heard he was run away.[12] I have heard

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[1] Spoken of a pawnbroker, and special damage alleged. (Stanton *v.* Smith, 2 L'd Raym. 1480.) This case was questioned 3 Bing. N. C. 840, but sustained Jones *v.* Littler, 7 M. & W. 423.

[2] Brown *v.* Smith, 13 C. B. 596; 1 Com. Law Rep. 49; 22 Law Jour. Rep. N. S. C. P. 151; 20 Eng. Law & Eq. R. 243.

[3] Spoken of a grazier. (Anon., 1 Bulst. 40.) Of a dyer. (Squire *v.* Johns, Cro. Jac. 558.) Of a shoemaker, who bought and sold leather. (Stanley *v.* Osbaston, Cro. Eliz. 268; and see Vin. Abr. Act. for Words, U. *a.* 18, 19, 35, 36, 38, I. *a.*)

[4] Hull *v.* Smith, 1 M. & S. 287.

[5] Spoken of a drover, whose business was to purchase droves of cattle and drive them to market and sell them. (Lewis *v.* Hawley, 2 Day, 495.) An innkeeper is a trader. (Ombony *v.* Jones, 19 N. Y. 241.) The words, "You have been a pauper ever since you have lived in the parish; you are now a pauper. I have paid £20 a year towards your maintenance; you will be in the bankrupt list in less than twelve months," spoken of an innkeeper, held actionable. (Whittington *v.* Gladwin, 5 B. & C. 180; 2 Car. & P. 146; s. c., Whitaker *v.* Bradley, 7 D. & R. 649.) So it is actionable to say of an innkeeper, He is broke, and there is neither entertainment for man nor horse. (Southam *v.* Allen, T. Raym. 231.)

[6] Spoken of a farmer. (Phillips *v.* Hoeffer, 1 Penn. St. Rep. 62.)

[7] Spoken of a distiller, the course of whose business was to purchase grain on credit. (Ostrom *v.* Calkins, 5 Wend. 263.)

[8] Anon., Lofft, 322. He is about to run away and defraud his creditors. (Prettyman *v.* Shockley, 4 Harring. 112.)

[9] In *three days*. (Thompson *v.* Twenge, 2 Rolle R. 423.) Or in six months. (Else *v.* Ferris, Anthon N. P. 23.) He will be bankrupt, without saying when, said not to be actionable. (Vin. Abr. Act. for Words, O. *a.*)

[10] Spoken of a laceman (a dealer in lace). (Read *v.* Hudson, 1 L'd Raym. 610.)

[11] Spoken of a carpenter. (Chapman *v.* Lamphire, 3 Mod. 155.) And spoken of a farmer. (Dobson *v.* Thornistone, 3 Mod. 112.) To say of a merchant, he is broke, is actionable. (Leycroft *v.* Dunkin, Cro. Car. 31.)

[12] Spoken of a tailor. (Davis *v.* Lewis, 7 Term R. 17.) Spoken of a carpenter, (3 Mod. 312.)

of no failures, but understand there is trouble with S.[1] Two dyers are gone off, and for aught I know H. will be so too, within this time twelve months.[2] H. will lose his debt; M. (plaintiff) is unable to pay it.[3] He came a broken merchant from Hamburgh.[4] All is not well with V.; there are many merchants who have lately failed, and I expect no otherwise of V.[5] There is no bottom to you. I would put you through, but you won't stand; you will burst or fail before I have a chance.[6] Thou art a beggarly fellow, and not worth a groat.[7] They have been sued; report says J. B.'s wife (J. B. being one of the plaintiffs) is about to apply for a divorce, and that J. B. has put his property out of his hands; if so, their store will be closed soon.[8] Where the defendant said of plaintiff, a tradesman in his shop, and in the presence of his customers, that certain wholesale dealers had closed their accounts with him and were going to shut him up (innuendo that plaintiff was insolvent or likely to be so); held, it was for the jury to say whether the words had the meaning ascribed to them in the declaration, and if so, they were actionable.[9] So actionable to say of a trader that his checks were dishonored.[10] But held not actionable to say

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[1] Spoken of a merchant. (Sewell *v.* Catlin, 3 Wend. 291.) To say of a banker, he suspended payment, is actionable. (*Dictum* in Forster *v.* Lawson, 3 Bing. 452.)

[2] Harrison *v.* Thornborough, 10 Mod. 11.

[3] Spoken of a merchant. (Mott *v.* Comstock, 7 Cow. 654.) It was held not actionable to say to a creditor of a merchant (the plaintiff), You were best to call for it (your money) in, and take heed how you trust him. (Vin. Abr. Act. for Words, U. *a.* 17.)

[4] Seycroft *v.* Dunker, Cro. Car. 317.

[5] Vivian's Case, 3 Salk. 326.

[6] Spoken of one engaged in buying and selling woodenware. (Carpenter *v.* Dennis, 3 Sandf. 305.)

[7] Simpson *v.* Barlow, 12 Mod. 591.

[8] Beardsley *v.* Tappan, 1 Blatch. Cir. C't R. 588.

[9] Gostling *v.* Brooks, 2 Fos. & F. 76.

[10] Rolin *v.* Steward, 14 C. B. 595; and see *ante* in note p. 58. Words in relation to the credit of a shareholder in the joint-stock of a boat, held actionable, special damage being shown, and there being a *colloquium* respecting plaintiff as such stockholder, and that it was a business requiring credit. (Turner *v.* Foxall, 2 Cr. C. C. 324.)

of traders, "look out sharp to get your bills met by them."[1]

§ 192. Language of one in his trade or profession is actionable *per se* when it imputes to him fraud, want of integrity, or misconduct in the line of the business or profession "whereby he gains his bread."[2] Thus it was held actionable to say of a weaver, He is a rogue and villain, and taketh the goods of his customers and pawneth them, and he is not a man to be trusted;[3] of an auctioneer and appraiser, He is a damned rascal, and has cheated me out of £100 on the valuation;[4] of a trader, He was guilty of dishonestly using old materials instead of new in doing a certain piece of work;[5] of a corn-factor, You are a rogue and a swindling rascal; you delivered me one hundred bushels of oats worse by six pence a bushel than I bargained for;[6] of a limeburner, He is a cheating knave;[7] of a bailiff, You did cozen your master of a bushel of barley, or, he hath deceived his master by buying and selling;[8] of a butcher, That he used false

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[1] Daines *v.* Hartley, 3 Ex. 200.

[2] Baboneau *v.* Farrell, 15 C. B. 360; Bryant *v.* Loxton, 11 Moore, 344; Davis *v.* Davis, 1 Nott & McCord, 290; Chipman *v.* Cook, 2 Tyler, 456; Rush *v.* Cavenaugh, 2 Barr, 187; Brown *v.* Mims, 2 Rep. Con. C't, 235; Foot *v.* Brown, 8 Johns. 64; Riggs *v.* Deniston, 3 Johns. Cas. 198; Thomas *v.* Jackson, 3 Bing. 104; 10 Moore, 425; Odiorne *v.* Bacon, 6 Cush. 185; Gay *v.* Horner, 13 Pick. 535; Ludwell *v.* Hole, 2 L'd Raym. 1417; Davis *v.* Miller, 2 Strange, 1169; Obaugh *v.* Finn. 4 Pike, 110; Boydell *v.* Jones, 4 M. & W. 446; 7 Dowl. (P. C.) 210; Sempsey *v.* Levy, 2 Jur. 776; Vin. Abr. Act. for Words, U. *a.* 25, 26. "Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable." (Fowles *v.* Bowen, 30 N. Y. 24.) "Thou hast received money of the king to buy new saddles, and hast cozened the king and bought old saddles," actionable. (Greenfield's Case, Mar. 82; 1 Vin. Abr. 465, pl. 19.)

[3] Vin. Abr. Act. for Words, U. *a.* 4.

[4] Bryant *v.* Loxton, 11 Moore, 344.

[5] Baboneau *v.* Farrell, 1 Jur. N. S. 114; 15 C. B. 360; 24 Law Jour. R. N. S. 9 C. P.; 28 Eng. Law & Eq. R. 339.

[6] Thomas *v.* Jackson, 3 Bing. 104; 10 Moore, 425; and to charge a merchant with being a swindler is actionable. (Herr *v.* Bamburg, 10 How. Pra. R. 128.) Notes 3, 4, p. 247, *ante.*

[7] Terry *v.* Hooper, Raym. 87; Lev. 115.

[8] Vin. Abr. Act. for Words, U. *a.* 5, and note 7, p. 225, *ante.*

weights;[1] of a jeweler, He is a cozening knave in selling me a sapphire for a diamond;[2] of a goldsmith, He sold me a chain of copper for gold; of one who sold chamois skins, He will cozen you and sell you lamb skins instead of chamois skins; of a brewer, that he makes or sells unwholesome beer; of a tradesman, that he adulterates the article in which he deals; of one who took children to board, that he starved a child entrusted to his care;[3] of a shipmaster, "he sold the consignment of the ship Rising Sun, and pocketed the money."[4] Both the plaintiff and defendant carried on the business of tailors. Plaintiff in company with A. went to defendant's store to purchase material with which to make trowsers for A. Defendant said to A., don't have anything to do with that man (plaintiff), he will rob you, he is a rogue. Defendant also asked A. to allow him (defendant) to make the trowsers. On the trial, the judge directed the jury that the words were actionable if spoken of the plaintiff in the way of his trade, and the jury having found for the plaintiff, the verdict was sustained in *banc.*[5] And actionable to charge the agent of a stage company, that he (plaintiff) and B., his sub-agent, had altered way-bills and books to screen the plaintiff (innuendo charging forgery), and that plaintiff and B. were together to cheat the company, and they would cheat them out of more than

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[1] Griffiths *v.* Lewis, 15 Law Jour. 249, Q. B.; and see Prior *v.* Wilson, 1 C. B. N. S. 95. The way in which Messrs. P. (the plaintiffs) do things at Guildford—inserting the wedge—innuendo inserting a wedge to falsify the weight.

[2] Vin. Abr. Act. for Words, I. *a.* 9, and several cases there referred to.

[3] Vin. Abr. Act. for Words, U. *a.* 27, 30, 28, 31, 29; Freem. 25. Charging a brewer with filthy and disgusting practices in preparing his malt, is actionable. (White *v.* Delavan, 17 Wend. 49; Ryckman *v.* Delavan, 25 Wend. 186.) See Wood *v.* Brown, 1 Marsh. 522; 6 Taunt. 169. In that case, a declaration which alleged that defendant published of plaintiff, a brewer, that his beer was of a bad quality and sold by deficient measure, was held bad on general demurrer, because the words were not set out in *hæc verba*, but it was merely alleged that the defendant published words *purporting* that plaintiff, &c.

[4] Orr *v.* Skofield, 56 Maine, 483.

[5] Sloman *v.* Chisholm, 22 Up. Can. Q. B. 20.

the company can make.[1] Actionable to charge by writing a steamboat agent with being an impertinent person and withholding newspapers entrusted to him for the defendants.[2] And it was held actionable to publish orally of a land surveyor, who surveyed by mathematics, as distinguished from one who measured with a pole. He is a cozening and shifting and a cheating knave; and it was said that the same words of a shoemaker, a butcher, or a baker, would not be actionable, because the goodness or deceit of their wares may be discerned by the eye, but deceit in land measuring could be discovered only by persons skilled in the art;[3] but not actionable to say of a workman, He has received forty days' wages for work that might have been done in ten days, and is a rogue for his pains;[4] nor to say of a smith, Thou art a cozening rogue, and in one tire of wheels which thou didst send to J. S., thou didst cozen him of a noble; for the words import he cozened in the price only, and not in the ill-making of the wheels. And for saying of men in trade who sell things that they cozen in the price, is no disgrace, for every trader cozens in the price when he sells for more than the thing is worth.[5] Actionable to publish orally of a merchant's clerk, That he (plaintiff) had become such a notorious liar that he (defendant) could place no confidence in him; that he had strong reason to doubt his honesty, and had written S. to employ an officer to watch him.[6] Actionable to publish orally of a merchant

[1] Gay *v.* Homer, 13 Pick. 535.

[2] Keemle *v.* Sass, 12 Miss. 499. The language being published in writing was actionable as concerning the plaintiff as an individual merely.

[3] Blunden *v.* Eustace, Cro. Jac. 504; London *v.* Eastgate, 2 Rolle R. 72.

[4] Lancaster *v.* French, 2 Stra. 797.

[5] Vin. Abr. Act. for Words, S. *a.* 24. Thou didst cozen a woman of her goods, held not actionable. (Engurst *v.* Browne, Cro. Eliz. 99.) And held not actionable to say of an innkeeper, He is a caterpillar, and lives by *robbing* his guests. Robbing not construed feloniously. (Vin. Abr. Act. for Words, U. *a.* 34.) *Ante* § 144, subd. *z.*

[6] Fowles *v.* Bowen, 30 N. Y. 20; and see Brown *v.* Orvis, 6 How. Pra. R. 378. Where the words affect one as merchant's clerk, special damage need not be alleged. (Butler *v.* Howes, 7 Cal. 87.)

that he is a villain, a rascal, and a cheater.[1] And the following words spoken of the plaintiff as clerk of the firm of defendant and his partner, "Your man (plaintiff) is plotting to blow me (defendant) and the concern (said firm) up," were held actionable.[2] So it has been held actionable to publish orally of an attorney, He is a forging rogue,[3] a cheat,[4] a damned rascal;[5] he will play on both sides or he deals on both sides,[6] a bribing knave, and has taken twenty pounds of you to cozen me;[7] he is not a man of integrity, and is not to be trusted; he will take a fee on both sides;[8] he is a cheater, I will have him barred of his practice;[9] he deserves to be struck off the roll;[10] he is a false knave, a cozening knave, and has gotten all that he has by cozenage; he has cozened all those that have dealt with him; he arresteth without taking out writs; he is a knave in his practice;[11] he offered himself as a witness to divulge the secrets of his clients;[12] he is a rogue for taking your money, and has done nothing for it; he has not entered an appearance for you; he is no attorney at law, he don't care to appear before a judge; what signifies going to him, he is only an attorney's clerk and a rogue, he is no attorney.[13] Is M. your attorney? * * He will overthrow your cause.[14] I marvel you will employ such a knave as Nicholls, you will have but disgrace by it; he is

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[1] Nelson *v.* Borchenius, 52 Ill. 236.

[2] Ware *v.* Clownoy, 24 Ala. 707.

[3] Anon., 1 Comyn R. 262.

[4] Rush *v.* Cavanaugh, 2 Barr, 187.

[5] Brown *v.* Mims, 2 Rep. Con. C't, 235.

[6] Brown *v.* Hook, Browl. 5; Vin. Abr. Act. for Words, S. *a.* 2, 4; Shire *v.* King, Yelv. 32; s. c. King *v.* Shore, Cro. Eliz. 914.

[7] Yardley *v.* Ellis, Hobart, 8, 9; 1 Rolle R. 53.

[8] Chipman *v.* Cook, 2 Tyler, 456.

[9] Taylor *v.* Starkey, Cro. Car. 192.

[10] *Dictum*, Phillips *v.* Jansen, 2 Esp. 624.

[11] Jenkins *v.* Smith, Cro. Jac. 586; Bell *v.* Thatcher, Freeman, 277.

[12] Riggs *v.* Denniston, 3 Johns. Cas. 198.

[13] Hardwick *v.* Chandler, 2 Str. 1138.

[14] Martyn *v.* Burlings, Cro. Eliz. 589; Golds. 128.

a proclaimed knave;[1] he is the falsest knave in England;[2] he is a base rogue, and maintains his family by his knavery;[3] he is an extortioner, and cozened A. in a bill of costs;[4] he keepeth many markets and stirreth up men to suits, and promises if he do not recover in their cause he will take no charges, and he once promised me that if he did not recover in a cause he would take no charges of me, yet he afterwards took charges of me;[5] he deserves to have his ears nailed to the pillory.[6] Thou art a paltry fellow; thy credit is fallen, for thou dealest on both sides, and dost deceive many that trust thee.[7] He suppressed a will;[8] he is a cozener, and hath cozened me of twenty shillings.[9] He is a cozener, and cozened his clients, and for that cause was discharged the court.[10] He is a base, cheating, cozening knave, and hath cheated me as never any man was cheated.[11] He took corruptly five marks of B. T., being against his own client, for putting off an assize against him.[12] Thou art a common barrator, a Judas, a promoter.[13] He sets people together by the ears, and we shall have him indicted for a common barrator.[14] You are a knave; you were attorney for my mother against my husband, and set her on to sue him, and made him spend £1,000, and such knaves as you are have made my husband spend almost all his estate.[15] And

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[1] Webb *v.* Nicholls, Cro. Car. 459.
[2] Anon., Mo. 61; Dal. 63.
[3] Shaw *v.* Wakeman, Vin. Abr. Act. for Words, S. *a.* 2.
[4] Stanley *v.* Boswel, Cro. Eliz. 603.
[5] Smith *v.* Andrews, Sty. 183.
[6] Jenkinson *v.* Wray, Mo. 41.
[7] Shire *v.* King, Yelv. 32; s. c., King *v.* Shore, Cro. Eliz. 914.
[8] Godfrey *v.* Owen, Palm. 21.
[9] Litman *v.* West, Het. 123.
[10] Mead *v.* Perkins, Cro. Car. 261.
[11] Jeffryes *v.* Payhem, Cro. Car. 510.
[12] Smayles *v.* Smith, Browl. 1.
[13] Taylor *v.* Starkey, Cro. Car. 192.
[14] Annison *v.* Blofield, Carth. 848.
[15] Hilton *v.* Playters, All. 13.

actionable to say of a counsellor, He will deceive you; he revealed the secrets of my cause.[1] It is actionable to publish in writing of an attorney employed to defend a prisoner, that on the trial he sent important witnesses away without the knowledge of his client or of counsel;[2] or that he has been reprimanded for sharp practice.[3] "I was so incensed with that girl (plaintiff) for coming to hire with me, after having had a miscarriage at Mrs. B.'s house, and she afterwards to give the girl a good discharge." These words spoken of a domestic servant, held actionable *per se*.[4]

§ 193. Language of one in a business or profession which imputes to him ignorance generally in his business or profession, or such ignorance or other incapacity as unfits him for its proper exercise, is actionable;[5] as to say of a physician or an apothecary, "It is a world of blood he has to answer for in this town through his ignorance; he did kill a woman and two children. He was the death of J. P.; he killed his patient with physic;[6] or, Dr. A. killed my children; he gave them teaspoon doses of calomel, and it killed them. . . . They died right off the same day;[7] or, He has killed the child by giving it too much calomel;[8] or, He has killed six children in one year;[9] or, He is a

[1] Snag *v.* Gray, March's Slan. 63.

[2] Sanford *v.* Bennett, 24 N. Y. 20.

[3] Boydell *v.* Jones, 4 M. & W. 446. Held not actionable to say orally of an attorney, he is a paltry lawyer (Rich *v.* Holt, Cro. Jac. 267); but actionable to say orally, He is a petty-fogging, blood-sucking attorney. (Armstrong *v.* Jordan, Carlisle Assizes, 1826.)

[4] Connors *v.* Justice, 13 Ir. C. L. R. 451.

[5] Jones *v.* Powell, 1 Mod. 272; Peard *v.* Jones, Cro. Car. 382; Camp *v.* Martin, 23 Conn. 86; Day *v.* Buller, 3 Wils. 59; Garr *v.* Selden, 6 Barb. 416.

[6] Tutty *v.* Alewin, 11 Mod. 221, and see note 1, p. 224, *ante*.

[7] Secor *v.* Harris, 18 Barb. 425.

[8] Johnson *v.* Robertson, 8 Porter, 486; see dictum March *v.* Davison, 8 Paige, 580. To charge a physician with having killed a patient with physic, held not actionable. (Poe *v.* Mondford, Cro. Eliz. 620.)

[9] Carroll *v.* White, 33 Barb. 615.

drunken fool and an ass, he never was a scholar;[1] or, I wonder you had him to attend you; do you know him? He is not an apothecary; he has not passed any examination; he is a bad character, none of the medical men here will meet him; several have died that he has attended, and there have been inquests held upon them;[2] or, He killed my child, it was the saline injection that did it;[3] or, He is an empirick and a mountebank;[4] or a quack;[5] or, He is a quack, and if he shows you a diploma it is a forgery;[6] or, His treatment of a patient was rascally;[7] and so it has been held actionable to say of a midwife, Many have perished for want of her skill (*i. e.* for her want of skill).[8] She is an ignorant woman, and of small practice, and very unfortunate in her way; there are few she goes to but lie desperately ill, or die under her hands.[9] She is no midwife but a nurse, and if I had not pulled her from Mrs. J. S. she had killed her and her child.[10] She lays no woman, but Dr. Chamberlayn or his lady does her work.[11] And it has been held actionable to say of a schoolmaster, Put not your son to him, for he will come away as very a dunce as he went.[12] He has no knowledge in grammar or in the Latin tongue, nor knows how to educate his

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[1] Cawdrey *v.* Tetley, Godb. 441.

[2] Southee *v.* Denny, 1 Ex. 196; 17 Law Jour. R. 151, Ex. Alleging that a physician is not entitled to practice as not being duly licensed, may be actionable. See Collins *v.* Carnegie, 3 Nev. & M. 703; 1 Ad. & El. 695.

[3] The words impute manslaughter. (Edsall *v.* Russell, 4 M. & G. 1090.)

[4] Vin. Abr. Act. for Words, S. *a.* 12. Publishing in writing of a barrister that he was a quack lawyer and a mountebank and an imposter, is actionable. (Wakley *v.* Healey, 7 C. B. 591.)

[5] Pickford *v.* Gutch, Dorchester Assizes, 1787. White *v.* Carroll, 42 N. Y. 161.

[6] Moises *v.* Thornton, 8 Term R. 303.

[7] Camp *v.* Martin, 23 Conn. 86.

[8] Flower's Case, Cro. Car. 211.

[9] Wharton *v.* Brook, Vent. 21; Wharton *v.* Clover, 2 Keb. 489.

[10] Whitehead *v.* Fownes, Freem. 277.

[11] Gyles *v.* Bishop, Freem. 278.

[12] Het. 71.

scholars in the Latin tongue, with an allegation of loss of scholars.[1] So it has been held actionable to say of an attorney, He hath no more law than Mr. C.'s bull, or than a goose;[2] he cannot *read* a declaration;[3] what, does he pretend to be a lawyer? he is no more a lawyer than the devil;[4] or of a barrister, He is a dunce, and will get little by law, he was never but accounted a dunce;[5] or of a shoemaker, that he is a cobbler;[6] or of a watchmaker, that he knows not how to make a good watch.[7] Actionable to say of a mason, "He is no mechanic, he cannot make a good wall, or do a good job of plastering, he is no workman, he is a botch;"[8] and actionable to write of an optician, he is "a licensed hawker and a quack in spectacle secrets."[9]

§ 194. It is not actionable to charge one in a business or profession with want of skill or ignorance in a particular transaction.[10] Thus it was held not to be actionable to say of an attorney in a particular suit, "He knows nothing about the suit; he will lead you on until he has undone you.[11] It is said, however, that it is actionable to charge ignorance or unskillfulness if it amounts to gross ignorance

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[1] London *v.* Eastgate, 2 Rolle's R. 72.

[2] Baker *v.* Morfue, Sid. 327.

[3] Powell *v.* Jones, 2 Keb. 710; 1 Mod. 272. It implies ignorance, not a defect of sight.

[4] Day *v.* Buller, 3 Wils. 59.

[5] Peard *v.* Jones, Cro. Car. 382.

[6] 1 Mod. 19; Vin. Abr. Act. for Words, U. *a.* 16.

[7] Redman *v.* Pyne, 1 Mod. 19; but to say of a watchmaker, he is a bungler, and knows not how to make a good piece of work, would be actionable. (*Id.*) Where A., the author of a work, sold the copyright to the defendant, who afterwards published a new edition as edited by A., containing mistakes and errors, held, if this was calculated to injure A.'s reputation as an author, he might maintain an action. (Archbold *v.* Sweet, 5 C. & P. 219; 1 M. & Rob. 162.)

[8] Fitzgerald *v.* Redfield, 51 Barb. 484; 36 How. Pr. R. 97.

[9] Keyzor *v.* Newcomb, 1 Fost. & F. 559.

[10] Garr *v.* Selden, 6 Barb. 416; Camp *v.* Martin, 23 Conn. 86; Southee *v.* Denny, 1 Ex. 196.

[11] Foot *v.* Brown, 8 Johns. 64.

or unskillfulness.[1] This seems only another mode of imputing such ignorance as unfits the person for the proper exercise of his art, or with misconduct therein.

§ 195. It was held actionable to publish *orally* of a minister of the gospel: that he preaches lies in the pulpit;[2] he made a seditious sermon,[3] he hath two wives,[4] he is a drunkard,[5] or incontinent,[6] or guilty of incest,[7] or he has a bastard,[8] or he is a perjured priest.[9] The following words were held not actionable, spoken of one who was a minister at the time of the publication, and who had been a draper in partnership with H. P., and who had a controversy with H. P. as to the partnership accounts: "I do not go by reports, I go by a knowledge of facts. Mr. H. (the plaintiff) is a rogue, and I can prove him to be so by the books at S. He pretends to say he has been as good

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[1] Secor *v.* Harris, 18 Barb. 425, and Sumner *v.* Utley, 7 Conn. 257; Johnson *v.* Robertson, 8 Port. 486; Camp *v.* Martin, 23 Conn. 86.

[2] Drake *v.* Drake, Sty. 363; and see Cranden *v.* Walden, 3 Lev. 17; Bishop of Norwich Case, Cro. Eliz. 1; Dod *v.* Robinson, Aleyn, 63, and Gallwey *v.* Marshall, 9 Ex. 294.

[3] Phillips *v.* Badly, 4 Rep. 19 *a.*

[4] Nicholson *v.* Lynes, Cro. Eliz. 94.

[5] McMillan *v.* Birch, 1 Binn. 178; Chaddock *v.* Briggs, 13 Mass. 248; *contra*, see Buck *v.* Hersey, 31 Maine (1 Red.) 558; O'Hanlon *v.* Myers, 10 Rich. Law (So. Car.) 128. In Dod *v.* Robinson, Aleyn, 63, the words were: You are a drunkard, a whoremaster, a common swearer and a common liar, and you have preached false doctrine, and deserve to be degraded. These words were held actionable.

[6] Demarest *v.* Haring, 6 Cow. 76. It seems that in England to render such a charge actionable, the person affected must be beneficed, or in the actual receipt of professional emolument as a preacher, lecturer, or the like. (Gallwey *v.* Marshall, 9 Ex. 294; and see note 12 p. 238, *ante.*) Saying of a Methodist minister that he kept company with whores, held not actionable without special damage. (Breeze *v.* Sarls, 23 Up. Can. Q. B. 94.)

[7] Spoken of a *paid* preacher or lay exhorter of the Methodist Church. (Starr *v.* Gardner, 6 Up. Can. Q. B. Rep. O. S. 512.)

[8] Special damage being alleged. (Payne *v.* Beaumorris, Lev. 248.) He is a lewd adulterer, and hath two children by the wife of O. S., spoken of a clergyman, held not actionable. (Parret *v.* Carpenter, Noy, 64, and *ante*, note 2, p. 272.) And so of the words, You are an old rogue, rascal, and contemptible fellow. (Musgrove *v.* Bovey, Stra. 946.)

[9] Hogg *v.* Vaughan, Sty. 6.

as a father to H. P., when in fact he has been robbing him. He has cheated P. of £2,000. I will so expose him that he will not be able to hold up his head in T. pulpit. * * * I wonder how any respectable person can countenance such a man by their presence. I have been advising some persons to go to the Wesleyan chapel as they would hear plain honest men."[1] So the following words spoken of a clergyman were held not actionable: "Dr. P. (plaintiff) placed before me a bill, I signed it; I do not know for what amount it was, for I was completely pigeoned by Dr. P." (plaintiff).[2] In the same case the following words spoken of a clergymen, held to touch him in his professional character, and to be actionable: "The very day I came into residence, Dr. P. (plaintiff) sent for me; I went and dined with him, and the wine must have been drugged, for I took but two glasses and was quite stupefied. While in this condition Dr. P. put a bill into my hands, and requested me to sign it, saying, C. just put your name to this; I wish to have it as a security for the payment of £130 per annum for reading for you. I answered, Give me a pen and I will sign it. Immediately I had signed it, Dr. P. snatched it up and said, This will be quite safe. The bill I think was drawn for £2,500, but having been stupefied with the wine I do not rightly remember. You cannot suppose I can meet a man who so cheated me at my first coming?" It is actionable to charge a Protestant archbishop with having sought by means of a bribe to induce a Romish priest to abandon his religious creed.[3] It was held not actionable to charge a Roman

[1] Hopwood *v.* Thorn, 8 C. B. 293.

[2] Pemberton *v.* Colls, 1011; 16 Law Jour. 403, Q. B. To charge a bishop with being a wicked man (Thomas *v.* Hughes, 2 Mod. 159), or a bankrupt, said to be actionable (Holt on Libel, 233, note); and held actionable to publish in writing that the plaintiff, a clergyman, had caused a misunderstanding in his congregation by personal invectives from the pulpit against a young lady of spotless reputation. (Edwards *v.* Bell, 8 Moore, 467.)

[3] Tuam *v.* Robeson, 5 Bing. 17; 2 M. & P. 32.

Catholic priest with having imposed certain penance, there being nothing to show that enjoining such penance affected his character as such priest.[1] To publish in writing of a clergyman that he came to the performance of divine service in a towering passion,[2] or that he desecrated a portion of the church by turning it into a cooking apartment,[3] held actionable.

§ 196. As regards language concerning one in an office, the same general principles apply as to language concerning one in trade. Language concerning one in office which imputes to him a want of integrity or misfeasance in his office, or a want of capacity generally to fulfill the duties of his office, or which is calculated to diminish public confidence in him,[4] or charges him with a breach of some public trust, is actionable.[5] But as in the case of one in trade, the language to be actionable must touch him in his office.[6] To charge a judge with erring in judgment or disregarding public sentiment, or with any impropriety which would not furnish a cause of impeachment, is not actionable *per se;* but to charge that he had "abandoned the common principles of truth," or "lacked capacity as a judge," or made the office of clerk of his court a subject of private negotiation, is actionable *per se.*[7] So it is actionable *per se* to charge that a judge improperly put his official signature to the jurat of a paper in the form of an affidavit,[8] or procured one to take a false oath,[9] or took a

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[1] Hearne *v.* Stowell, 12 Adol. & El. 719.

[2] Walker *v.* Brogden, 19 C. B. N. S. 65.

[3] Kelly *v.* Sherlock, Law Rep. 1 Q. B. 686.

[4] Lansing *v.* Carpenter, 9 Wis. 540.

[5] Kinney *v.* Nash, 3 N. Y. 177, and authorities there referred to.

[6] McGuire *v.* Blair, 2 Law Reporter, 443, and *ante,* § 190. So that charging a justice with misfeasance in trying a cause, not within his jurisdiction, was held not actionable as not affecting him as justice. (Oram *v.* Franklin, 5 Blackf. 42; see, however, Carter *v.* Andrews, 16 Pick. 1; Stone *v.* Clark, 21 *id.* 51.)

[7] Robbins *v.* Treadway, 2 J. J. Marsh. 540.

[8] Dollaway *v.* Turrill, 26 Wend. 383; 17 *id.* 426.

[9] Chetwind *v.* Meeston, Cro. Jac. 308.

bribe,[1] or acted unjustly in his office,[2] or to charge that he is a lewd or false,[3] or corrupt,[4] or a partial,[5] or half eared, and will hear but one side, or that he cannot hear of one ear,[6] or that he perverted justice,[7] or made use of his office to worry one out of his estate,[8] or, He is forsworn and not fit to sit upon a bench,[9] or, He did seek my life and offered ten shillings to the under-sheriff to empanel a jury that might find me guilty.[10] But held not actionable to publish orally of a justice, He is a blood-sucker and seeketh after blood, if a man will give him a couple of capons he will take them;[11] or, You robbed the poor and are worse than a highwayman.[12] It is not actionable to say of a mayor, He is a rogue and rascal;[13] or of an alder-

[1] Cotton's Case, Mo. 695. In Lindsey *v.* Smith, 7 Johns. 360, an action was sustained for the words, "Lindsey had been feed by Abner Wood, and I could do nothing when the magistrate was in that way against me."

[2] I have often been with him for justice, but could never get any at his hands but injustice. (Isham *v.* York, Cro. Car. 14.) Actionable to say of a judge, his sentence was corruptly given. See Chaddock *v.* Briggs, 13 Mass. 253; Chipman *v.* Cook, 2 Tyler, 456.

[3] Wright *v.* Moorhouse, Cro. Eliz. 358.

[4] Cæsar *v.* Curseny, Cro. Eliz. 305. You are a rascal, a villain, and a liar, spoken of a magistrate in the execution of his office, the words import a charge of corruption. (Aston *v.* Blagrave, 1 Strange, 617; 2 L'd Raym. 1369.) And so of the term rogue. (Kent *v.* Pocock, 2 Str. 1168.)

[5] Kemp *v.* Housgoe, Cro. Jac. 90.

[6] Masham *v.* Bridges, Cro. Car. 223, and Alleston *v.* Moor, Het. 167.

[7] Delaware *v.* Pawlet, Mo. 409.

[8] Newton *v.* Stubbs, 3 Mod. 71.

[9] Carn *v.* Osgood, 1 Levinz, 280; s. c., Kerle *v.* Osgood, 1 Vent. 50; and see Pepper *v.* Gay, 2 Lutw. 1288; Stutley *v.* Bulhead, 4 Rep. 16 *a*, 19 *a*; Lassels *v.* Lassels, Mo. 401; Hollis *v.* Briscow, Cro. Jac. 58; Burton *v.* Tokin, Cro. Jac. 143; Beamond *v.* Hastings, Cro. Jac. 240.

[10] Bleverhassett *v.* Baspoole, Cro. Eliz. 313.

[11] Hilliard *v.* Constable, Mo. 418. Held actionable to publish in writing of a justice that he had been chairman of a finance committee, and had audited accounts, containing items nominally to furnish lodgings for the judges, but in reality for the accommodation of the magistrates; innuendo that plaintiff had conducted himself corruptly in his office of justice. (Adams *v.* Meredew, 3 Y. & J. 219, overruling s. c., 2 Y. & J. 417. This case was, it is said, carried to the House of Lords.)

[12] Palmer *v.* Edwards, Rep. of Cas. of Prac. in C. B. 160.

[13] Reg *v.* Langley, 6 Mod. 125; 2 Salk. 697.

man, When he puts on his gown Satan enters it;[1] or of an under-sheriff, Thou didst serve an execution and keep in thy hands the money collected.[2] But it is actionable to charge a sheriff with malpractice in his office;[3] or to say of a constable, He is not worthy of his office, for he and his company the last time he was constable stole five of my swine and eat them;[4] or to publish in writing of a police officer that he had been guilty of blackmailing and had been dismissed for that cause.[5] But held not actionable to publish orally of a police officer, I saw a letter respecting an officer of the *L.* police, who had been guilty of conduct unfit for publication, there being no allegation of special damage and the charge not being connected with his official character.[6] It is actionable to publish orally of the director of a public company, that he had sold the property of the company and pocketed the money;[7] or of a town clerk acting as moderator of a town meeting, that he had fraudulently destroyed a vote;[8] or of an administrator, that he had been guilty of fraud in the appraisement of the estate of the decedent;[9] or of a juror, that he agreed with another juror to determine the amount of damages to be given in a certain cause in which he acted as juror, by the result of a game of draughts.[10] A church-

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[1] 2 Starkie on Slander, 314.

[2] Geeve *v.* Copshill, Cro. Eliz. 854.

[3] Dole *v.* Van Rensselaer, 1 Johns. Cas. 330.

[4] Taylor *v.* Howe, Cro. Eliz. 861. Doubtful if actionable to say of a constable, Thou art a cozening knave, and has cozened the parish in rates to £30. (Thomas' Case, Het. 36.)

[5] Edsall *v.* Brooks, 17 Abb. Pra. R. 221; 2 Robertson, 29.

[6] James *v.* Brook, 9 Q. B. 7; 16 Law Jour. 17 Q. B.; 10 Jur. 541.

[7] Johnson *v.* Shields, 1 Dutcher, 116.

[8] Dodds *v.* Henry, 9 Mas. 262.

[9] Beck *v.* Stitzel, 21 Penn. St. R. (9 Harris), 522.

[10] Commonwealth *v.* Wright, 1 Cush. 46. The charge was in writing. Held actionable to publish orally of a juryman, Thou art a common juryman, and hast been the overthrow of one hundred men by thy false means. (Vin. Abr. Act. for Words, F. *a.* 23.)

warden holds a temporal office, and to charge him with cheating the parish, is actionable.[1] It is actionable to publish in writing of a court commissioner, that he will act in his judicial office according to the views of the persons "whose tool and toady he is, and that the past would warrant the depriving him of his office;"[2] of an overseer, that when out of office he advocated low rates, and that he (defendant) would not trust him (plaintiff) with £5 of his private property;[3] or of an overseer, that he had been guilty of illiberal and illegal practices towards paupers, in compelling them to procure goods from a particular person, and threatening him with the penalties of the act against such practices;[4] or of a postmaster, who resided in the house used as the post-office, that the house in which the post-office is kept is of such a low character that a decent lady dare not enter.[5] And actionable to publish orally of a postmaster that he opened a letter, took money out of it, and appropriated it to his own use, and kept and embezzled letters;[6] or that he would rob the mail for five hundred dollars—yes, he would rob the mail for five dollars.[7] It is not actionable to charge a member of Parliament with want of sincerity;[8] or a member of the legis-

[1] Townsend *v.* Barker, Sty. 394; Woodruff *v.* Wooley, Curt. 1; Strode *v.* Holmes, Sty. 338; and see Hutton *v.* Beck, Cro. Jac. 339; Hopton *v.* Baker, 2 Bulst. 218; Willis *v.* Shepherd, Cro. Jac. 619; Harle *v.* Catherall, 14 L. T. N. S. 801.

[2] Lansing *v.* Carpenter, 9 Wis. 540.

[3] The jury found that the words imputed dishonesty. (Cheese *v.* Scales, 10 M. & W. 448.)

[4] Woodard *v.* Dowsing, 2 M. & Ry. 74.

[5] Johnson *v.* Stebbins, 5 Ind. (Porter), 364.

[6] Hays *v.* Allen, 3 Blackf. 408. See *contra*, McCuen *v.* Ludlum, 2 Harrison, 12, and notes 12, p. 237, & 4, p. 253, *ante*, and Taylor *v.* Kneeland, 1 Doug. 67.

[7] Craig *v.* Brown, 5 Blackf. 44.

[8] Onslow *v.* Horne, 2 W. Black. 750; 3 Wils. 177. The words complained of were: "As to instructing our members to obtain redress, I am totally against that plan; for as to instructing Mr. Onslow (the plaintiff), we might as well instruct the winds, and should he (the plaintiff) ever promise his assistance, I should not expect him to give it us." One of the reasons for holding the words not actionable was, they did not charge the plaintiff with any breach of his duty, his oath, or any crime or misdemeanor whereby he had suffered any temporal loss, in future office, or in any way whatever.

lature, in reference to the future discharge of his functions, with being a corrupt old tory.[1] It is actionable to publish in writing of a member of Congress, "He is a fawning sycophant, a misrepresentative in Congress, and a groveling office-seeker; he has abandoned his post in Congress in pursuit of an office;"[2] or of a lieutenant-governor, that he was in a beastly state of intoxication while in the discharge of his duty in the senate, and was an object of loathing and disgust;[3] or a commissioner of bankrupts, with being a misanthropist, and violent partisan, stripping unfortunate debtors of every cent, and then depriving them of the benefit of the act.[4] In an action by G., a United States collector, for slander, the declaration charged these words: "G. has not accounted to the department for the sum paid by W. by some $32,000." "In the settlement of the funds of W., amounting to many hundreds of thousands of dollars, the amount paid by them was $135,224; only $125,224 was accounted for, of which $62,612 was credited to the government, leaving the same amount ($62,612) divided between the collector, the naval officer, and the surveyor; it is not known what has been done with the balance, amounting to the large sum of $32,000, and it is understood that this settlement was made through the interventions of S. and his partner, the late deputy collector; it is discreditable to the government to have it generally known that the sum of $157,224 was paid by W. in a settlement with the government, and that $32,000 of that sum was not accounted for." No words alleging a failure to pay on demand were charged. The innuendoes averred the imputation of embezzlement and of receiving a bribe. *Held*, that the words were not actionable.[5]

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[1] Hogg *v.* Dorrah, 2 Port. 212.

[2] Thomas *v.* Crosswell, 7 Johns. 264; and see Wilson *v.* Noonan, 23 Wis. 105

[3] Root *v.* King, 7 Cow. 613; 4 Wend. 113.

[4] Riggs *v.* Denniston, 3 Johns. Cas. 198.

[5] Goodrich *v.* Hooper, 97 Mass. 1.

§ 197. We have already directed attention to the distinction between patently and latently wrongful acts, and to the rule of law that the necessary and natural and proximate consequences of an act are those alone for which the actor is responsible (§ 61); and we have pointed out the difference between language being actionable *per se* and actionable only by reason of special damage (§ 146). So far, this chapter has been solely devoted to language actionable *per se;* we have now to consider what language *concerning a person* is actionable, because and only because its publication has occasioned *special damage.* "Undoubtedly, all words are actionable if a special damage follows."[1] "Any words are actionable by which the party has a special damage."[2] "To make words actionable, they must be such that special damage may be the fair and natural result of them."[3] "There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages, and a clear and wise one has been fixed by law."[4] The limitation is, that special damage must ensue. But what is meant by special damage? Special damage is a term ambiguously employed; properly, it connotes the natural and proximate but not necessary consequences of a wrongful act;[5] but it is frequently used to

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[1] Heath, J., Moore *v.* Meagher, 1 Taunt. 39; and see among other cases, Wilby *v.* Elston, 13 Jur. 706; 8 C. B. 142; 7 Dowl. & L. 143; Barnes *v.* Trundy, 31 Maine (1 Red.) 321; McCuen *v.* Ludlum, 2 Harrison 12; Bentley *v.* Reynolds, 1 McMullan, 16. Acts (words) may be harmless in themselves, so long as they injure no one, but the consequences of acts (words) often give character to the acts (words) themselves. (Van Pelt *v.* McGraw, 4 N. Y. 113.)

[2] Comyn's Dig., Act. for Defam. D, 30.

[3] Taunton, J., Kelly *v.* Partington, 3 Nev. & M. 116; 5 B. & Adol. 645.

[4] Strong, J., Terwilliger *v.* Wands, 17 N. Y. 61.

[5] Such damages as are the *natural*, although not the necessary result of the injury, are termed special damages. (Vanderslice *v.* Newton, 4 N. Y. 132.) The special damage must be the immediate, not the remote consequence of the publication. (Beach *v.* Ranney, 2 Hill, 309; Sewell *v.* Catlin, 3 Wend. 291.) "The damage must be the natural and proximate consequence of the wrongful act complained of." (2 Smith's Lead. Cas. 534, 6th ed.) "I have always understood that the special damage must be the natural result of the thing done." (Patteson, J., Kelly *v.* Partington, 5 B. & Adol. 546;) and see Haddon *v.* Lott, 15 C. B. 411; 24 Law Jour. Rep. N. S. 49 C. P.

indicate any or all loss which, not being a necessary consequence, is the subject of other proof than the mere commission of the act complained of, and without regard to whether such loss is or is not a natural or natural and proximate consequence of such act. The term is employed in the latter sense when it is said that language which occasions *special damage* is not actionable unless it be defamatory,[1] which is equivalent to saying, that language which as a natural and proximate consequence occasions loss, is not actionable unless it is injurious (defamatory). If the language is not injurious (defamatory) in its nature, it cannot as a *natural* consequence occasion loss, and it may well be that none other than language defamatory in its nature (disparaging) can as a natural and proximate consequence occasion loss. It may be correct to say that "to make the words wrongful they must in their nature be defamatory,"[2] provided the rule thus expressed be understood as being subordinate to and implied in the more comprehensive rule, that to render actionable that language which is not actionable *per se*, the language must occasion special damage, in the proper sense of that term.[3] The real question must always be, was the damage complained of a natural and proximate consequence of the publication.[4] For "it is a rule equally consistent with good sense, good logic, and good law, that a person who would recover damages for an injury occasioned by the conduct of another,

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[1] "The special damage will not help you if the words are not defamatory." (Blackburn, J., Young *v.* McCrae, 3 Best & S. 264; 7 Law Times, N. S. 354.)

[2] Patteson, J., Kelly *v.* Partington, 5 B. & Adol. 645.

[3] "I cannot agree that words laudatory of a person's conduct would be the subject of an action if they were followed by *special damage*. They must be defamatory or injurious in their nature." (Littledale, J., Kelly *v.* Partington, 3 Nev. & M. 117; 5 B. & Adol. 645.) "The words must be defamatory in their nature; and must in fact disparage the character, and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result." (Strong, J., Terwilliger *v.* Wands, 17 N. Y. 61); and see Hallock *v.* Miller, 2 Barb. 633.

[4] Denman, Ch. J., Knight *v.* Gibbs, 3 Nev. & M. 467; 1 Adol. & El. 48.

must show as an essential part of his case, the relation of cause and effect between the conduct complained of and the injury sustained." [1]

§ 198. What is special damage? Special damage consists [2] in the loss of marriage, loss of *consortium* of husband and wife,[3] loss of emoluments, profits, customers, employment, or gratuitous hospitality,[4] or by the being subjected to any other inconvenience or annoyance occasioning or involving an actual or constructive pecuniary loss.[5] The special damage must be the loss of some material temporal advantage. Loss of *consortium vicinorum* is not

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[1] Olmstead *v.* Brown, 12 Barb. 662.

[2] "As to what constitutes special damage, Starkie mentions the loss of marriage, loss of hospitable gratuitous entertainment, preventing a servant or bailiff from getting a place, the loss of customers by a tradesman, and says that, in general, whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient." (Terwilliger *v.* Wands, 17 N. Y. 60; citing Starkie on Slander, 195, 202; Cooke on Defam. 22, 24.) Plaintiffs being refused employment (Strong *v.* Forman, 2 Car. & P. 592), or insurance upon a ship of which he was master (Shipman *v.* Burrows, 1 Hall, 399), is special damage.

[3] Lynch *v.* Knight, 5 Law Times, N. S. 291; 9 Ho. L. 577, Parkins *v.* Scott, 6 Law Times, N. S. 394; 1 H. L. 153; Roberts *v.* Roberts, 33 Law Jour. Q. B. 249, and see Clayton, 73.

[4] Moore *v.* Meagher, 1 Taunt. 39; Williams *v.* Hill, 19 Wend. 305.

[5] "All the cases proceed upon the assumption that the plaintiff has sustained some pecuniary loss in consequence of the slander. It is not sufficient that she has fallen into disgrace, contempt, and infamy, and lost her credit, reputation, and peace of mind, or the society or good opinion of her neighbors, unless she has been injured in her estate or property." (Woodbury *v.* Thompson, 3 N. Hamp. 194; and see *ante*, notes 2, p. 103, and 2, p. 107; Kelly *v.* Partington, 3 Nev. & M. 116; Keenholts *v.* Decker, 3 Denio, 346; Foulger *v.* Newcomb, Law Rep. II, 330, Ex.) And because, in England, the fees of barristers and physicians are honorary, it has been doubted if barristers or physicians can sustain special damage in their professions. (Brown *v.* Kennedy, 32 Law Journ. Chan. 342.) The doubt, however, is ill-founded, as the loss of a gratuity is special damage. (Hartley *v.* Herring, 8 T. R. 130, and note 2 *supra*, and note 1, p. 298, *post.*) "One essential element of a good cause of action for defamation is damage," but in Terwilliger *v.* Wands, 17 N. Y. 61, and Wilson *v.* Goit, *id.* 442, the whole tenor of the opinions imply that loss of reputation is the gist of the action, and in the first named case it is said, "It is injuries affecting the reputation only, which are the subject of the action." "The special damage must flow from impaired reputation." This, however, may mean only that the language must be defamatory. See *ante*, note 2, p. 103.

sufficient.[1] Where words were spoken imputing unchastity to a woman, by reason whereof she was excluded from a private society and congregation of a sect of Protestant dissenters, of which she had therefore been a member, and was prevented from obtaining a certificate, without which she could not become a member of any other society of the same nature, held that such a result was not "special damage," and did not, render the words actionable,[2] but an action was held maintainable where the plaintiff, an unmarried woman, in consequence of a charge of incontinence, was refused civil treatment at a hotel or tavern.[3] A charge of incontinence against an unmarried woman, whereby she loses her marriage, is actionable,[4] as to say of the plaintiff, Anne Reston hath had a child, and if she has not a child, she has made away with it;[5] or, You ought not to marry M., the plaintiff, for before God she is my wife, and therefore if you do, you will live in adultery, and your children will be bastards.[6] Loss of a wife is the same to a man as loss of a husband is to a woman, and therefore, where the defendant called the plaintiff a whoremaster, whereby he lost his marriage, it was held he could maintain his action;[7] and so saying of one who was a widower that he had kept his wife basely, and starved her or denied her necessaries, whereby he lost his marriage, was held actionable;[8] and calling

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[1] Roberts *v.* Roberts, 33 Law Jour. Q. B. 250; Beach *v.* Ranney, 2 Hill, 309.

[2] Roberts *v.* Roberts, 33 Law Jour. Q. B. 250.

[3] Olmstead *v.* Miller, 1 Wend. 510.

[4] Davis *v.* Gardiner, 4 Co. 16.

[5] Reston *v.* Pomfreict, Cro. Eliz. 639.

[6] Shepherd *v.* Wakeman, Sid. 79; Lev. 37. Saying of a woman, she was a man, not a woman, with special damage held actionable. (Pye *v.* Wallis, cited Curt. 55.) See Hermaphrodite.

[7] Matthew *v.* Crass, Cro. Jac. 323; 2 Bulst. 86; and see Sell *v.* Facy, 2 Bulst. 276; Southall *v.* Dawson, Cro. Car. 269; *contra*, see Witcher's Case, Keb. 119. In Taylor *v.* Tally, Palmer, 385, defendant said of plaintiff that he, plaintiff, had ravished the wife of H.; and plaintiff alleging that thereby he lost his marriage, the words were held actionable.

[8] Anon. Mar. 2; Wicks *v.* Shepherd, Cro. Car. 155.

plaintiff bastard, whereby he lost his marriage, was held actionable.[1] As to loss of customers, where it was said of an innkeeper, I (defendant) saw Cook lie with Collins' (plaintiff's) wife, whereby plaintiff lost his customers, it was held that an action could be maintained;[2] and so where it was said of an innkeeper, that a person had died in his house of the plague, whereby his (plaintiff's) guests left his house, it was held he might maintain his action.[3] Words imputing incontinence to a dissenting minister, whereby the persons frequenting his chapel refused to permit him to preach, and discontinued giving him certain reward as they usually had, and but for the publication complained of would have done, were held actionable.[4] Where the declaration alleged that plaintiff being the proprietor of certain rooms adapted for a dancing academy, defendant falsely and maliciously published of the building and rooms, and of plaintiff as proprietor thereof, that "the magistrates having refused to renew a music and

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[1] Nelson *v.* Staff, Cro. Jac. 422. Saying of the plaintiff, He hath been in bed with Dorchester's wife, whereby he lost his marriage, held actionable. (Southold *v.* Daunston, Cro. Car. 269.)

[2] Collins *v.* Matthews, 3 Keb. 242.

[3] Comyn's Dig., Act. for Def. D. 29; as to loss of customers, see Evans *v.* Harries, 1 Hurl. & Nor. 251; 38 Eng. Law and Eq. R. 347; Vin. Abr. Act. for Words, U. *a.* 13; Barrow *v.* Gibson, L'd Raym. 831; 1 Str. 566; Bull. N. P. 7; 1 Lev. 140; Trenton Ins. Co. *v.* Perrine, 3 Zabr. 402. Action by a butcher for saying a cow, the carcass of which he had to sell, died by calving, by which he lost his customers, judgment was given for the plaintiff, but reversed on error, the alleged loss of customers being too general; but held that had it been laid, the plaintiff *exposed the meat for sale*, and by reason of the words he lost the sale, the action could have been maintained. (Rice *v.* Pidgeon, Comb. 161, and Tassan *v.* Rogers, 2 Salk. 693.) "A distinction has been made between *particular* damage and *general* damage; thus, in an action for slandering a man in his trade, when the declaration alleges that he thereby lost his trade, he may show a general damage to his trade, though he cannot give evidence of particular instances." (Creswell, J., Rose *v.* Groves, 5 M. & G. 618.) To prove the loss of a customer, the customer must be called to prove *why* he ceased to deal with the plaintiff, and if the witness says he ceased to deal with plaintiff in consequence of something he heard from one, not the defendant, it is not special damage. (Barnett *v.* Allen, 1 Fost. & F. 125; and see Dixon *v.* Smith, 5 Hurl. & N. 450; Hirst *v.* Goodwin, 3 Fost. & F. 257.)

[4] Hartley *v.* Herring, 8 T. R. 130.

dancing license to the proprietor, all such entertainments there carried on are illegal, and the proprietor renders himself thereby indictable for keeping a disorderly house, and every person found on the premises will be apprehended and dealt with according to law," by means of which publication plaintiff was prevented from letting said rooms; held on demurrer that the declaration disclosed a cause of action.[1]

§ 199. It seems that where the person to whom the publication is made is, by reason of the charge, induced to act upon it to the prejudice of the person whom it may concern, it is immaterial whether the person to whom the publication was made believed or disbelieved in the truth of the charge; thus, where a charge was made to a mistress against a female (the plaintiff) in her employ, in consequence of which she dismissed the plaintiff from her employ, on the trial she testified that such dismissal was not because she believed the charge to be true, but because she was afraid she should offend the defendant, her landlord, by retaining plaintiff in her employ; held, that the special damage being the consequence of the charge, the action was maintainable, the court could not speculate upon motives of witnesses.[2]

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[1] Bignell *v.* Buzzard, 3 Hurl. & Nor. 217. In Dibdin *v.* Swan, 1 Esp. Cas. 28, the plaintiff was the proprietor of a place of amusement called Sans Souci, where he sang certain songs supposed to be composed by himself; he sued the defendant, the proprietor of a newspaper called the World, for publishing in that paper that such songs were not composed by the plaintiff; that on the first night when plaintiff sang there had been a very thin audience, and that composed of persons admitted by orders (for free admission), and that the applause was only from the persons so admitted. The report does not state the result of the case, but merely the charge of Lord Kenyon, that the editor of a newspaper may fairly and candidly comment on any place or species of public entertainment, but it must be done fairly and without malice or view to injure the proprietor. That if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if the comment be unjust, malevolent, or exceeding the bounds of fair opinion, it is actionable. As to comments on theatrical performances, see Fry *v.* Bennett, 5 Sand. 54; 3 Bosw. 200; 28 N. Y. 324; Gregory *v.* Duke of Brunswick, 6 M. & G. 953.

[2] Knight *v.* Gibbs, 3 Nev. & M. 467; 1 Adol. & El. 43. I do not know that the

§ 200. Mere apprehension of loss is not such special damage as will maintain an action; as where defendant said of plaintiff that he had two bastards, and the alleged special damage was that, by reason of the words, a contention arose between plaintiff and his wife, and he was in danger to be divorced.[1] And where the defendant said of plaintiff, she is with child by T. S., and the alleged special damage was that in consequence of the words the father of plaintiff *threatened* to turn her out of his house, this was held not to amount to such special damage as would support an action.[2] Where the plaintiff alleged that she was a single woman and chaste, and that her mother meant to give her £150 and her brother £100, and that by reason of the defendant's charging her with incontinence, they did not give her these sums, it was doubted if the action was maintainable, and no judgment was rendered.[3] Again, where the plaintiff alleged that by reason of the publication he had incurred the ill-will of his mother-in-law, who had previously promised him £100, held that no cause of action was shown.[4] Where the plaintiff alleged that her brother had promised to supply her with the means to emigrate from Ireland, but in consequence of the defendant's imputation her brother had retracted his promise until the truth of the charge was established or refuted, this was held to constitute special damage, and that it was not necessary to allege that there was any con-

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belief of the party is at all material. I may not believe a charge, and yet I may not have the courage to keep a person who is suspected by others. I think it better that we should lay it down generally, that if the words are slanderous, and are acted upon to the prejudice of the party slandered, an action may be maintained. (*Id.*) To the like effect see Gillett *v.* Bullivant, 7 Law Times, 490. *Contra* is a dictum, Wilson *v.* Goit, 17 N. Y. 445. An action of slander * * would plainly be perverted if allowed where the slanderous words were not credited by any individual.

[1] Randle *v.* Beal, Cro. Jac. 473; Salter *v.* Browne, Cro. Car. 436.

[2] Barnes *v.* Bruddell, 2 Keb. 451; s. c. 1 Lev. 261.

[3] Bracebridge *v.* Watson, Lilly Ent. 61.

[4] Harris *v.* Porter, Curt. 1.

sideration for the brother's promise.[1] Where the injury to the plaintiff is the result in part only of the defendant's act, subject to the qualifications hereafter to be mentioned, it will not give a right of action against the defendant; thus, where the plaintiff was discharged from his employment partly on account of the publication by the defendant and partly from other causes, it was held that the plaintiff could not recover.[2] And where the plaintiff alleged that in consequence of the words he (the plaintiff) refused to marry his betrothed, and so he lost his marriage, it was held the loss of marriage did not under such circumstances constitute special damage.[3] Where the plaintiff alleged that by reason of the language published by the defendant all honest persons refused to marry their daughters to him (the plaintiff), held that the plaintiff did not disclose a cause of action.[4] As the law gives no remedy for outraged feelings or sentiments (§ 56), a sickness induced by mental distress in consequence of the language published, followed by inability to transact business and expense for medical attendance, does not constitute special damage, and for words not actionable *per se* which occasion such results, no action can be maintained.[5] If, after a recovery has been had in an action for

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[1] Corcoran *v.* Corcoran, 7 Ir. L. R. N. S. 272.

[2] Vickars *v.* Wilcocks, 8 East, 1; 2 Stark. Ev. 637.

[3] Carter *v.* Smith, Vin. Abr. Act. for Words, D. *a.* 10.

[4] Norman *v.* Simons, Vin. Abr. Act. for Words, D. *a.* 12.

[5] Terwilliger *v.* Wands, 17 N. Y. 54; Wilson *v.* Goit, 17 N. Y. 442; Alsop *v.* Alsop, 5 Hurl. & Nor. 534; Bedell *v.* Powell, 13 Barb. 183. These decisions overrule Brandt *v.* Towsley, 13 Wend. 253; Fuller *v.* Fenner, 16 Barb. 333; Olmstead *v.* Brown, 12 Barb. 657; Underhill *v.* Welton, 32 Verm. (3 Shaw), 40. That plaintiff was shunned by her neighbors, and turned out of the moral reform society, was held not to constitute special damage. (Beach *v.* Ranney, 2 Hill, 309; and see *ante*, note 2, p. 294.) Loss of a wife's services from illness occasioned by the publication of language not actionable *per se*, is not special damage, so as to give a right of action to the husband. (Wilson *v.* Goit, 17 N. Y. 442; Alsop *v.* Alsop, 5 H. & N. 534; 29 L. J. Ex. 315; and see Guy *v.* Gregory, 9 Car. & P. 584; Beach *v.* Ranney, 2 Hill, 309.) In an action by husband and wife, for words of the wife actionable *per se*, the plaintiff cannot recover as special damage loss occasioned by one refusing to employ his wife as a

slander or libel, special damage occurs, no action can be maintained therefor; the first recovery is a bar to any subsequent action.[1]

§ 201. It has been very generally reputed and accepted for law, that the illegal act of a third party cannot constitute special damage;[2] in other words, that one illegal (wrongful) act cannot be a natural and proximate consequence of another illegal (wrongful) act. This idea appears very frequently in the reports, in the expression that special damage must be the natural *and legal* consequence of the act complained of. The case usually referred to in support of this proposition is one in which the defendant falsely asserted that plaintiff had cut his master's cordage, in consequence of which the plaintiff's master, although under a binding contract to employ him for a term which had not then expired, discharged him, it was held the plaintiff could not recover; that such discharge did not constitute special damage, because it was not a natural and *legal* consequence of the publication; that the defendant was no more answerable for the discharge than if in consequence of the words spoken other persons had assaulted the plaintiff; and that if in such a case plaintiff could recover, for the refusal of a third person to perform his legal contract, he might twice recover for the same cause—once in the action for the slander, and again in an action against the third person for the breach of his contract.[3] It was sufficient to sustain

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servant. That is damage for which the husband alone must sue. (Dengate *v.* Gardiner, 4 M. & W. 5.)

[1] Bull. N. P. 7, citing Fittler *v.* Veal, Cas. K. B. 542; Cooke Defam. 24.

[2] Bentley *v.* Reynolds, 1 McMullin, 16.

[3] Vickars *v.* Wilcocks, 8 East, 1. This is one of the cases selected by Mr. Smith as a leading case, and appears with an elaborate note in 2 Smith's Leading Cases. This case is commented upon in a note, 1 Starkie on Slander, 207. Similar to Vickars *v.* Wilcocks is Morris *v.* Langdale, 2 Bos. & Pul. 289, where Lord Eldon, Ch. J., said: "A great part of the special damage consists in an allegation that other persons did not perform their lawful contracts with him. Now, if the plaintiff has sustained any

this decision that the discharge was not a *natural* consequence of the publication; the residue of the decision is *obiter*, and is not sustainable either on principle or precedent. Subsequently, in an action for words whereby one who was under a contract to marry the plaintiff, broke his contract and refused to marry her, it was urged against the maintenance of the action that the plaintiff had her remedy on the contract to marry her, that the breach of the contract was an *illegal* act of the contracting party, and that the breach of said contract was not special damage, because not a *legal* consequence of the publication, but the action was sustained.[1] These decisions, although apparently conflicting, are not so in reality; for obviously an illegal act, equally with a legal act, *may* be the natural consequence of a publication, and where, as in the case of a promise to marry, the breach of it, although illegal, is nevertheless a natural consequence of the publication, in that case the illegal act constitutes special damage; but where the breach of a contract is not a natural, or, if a natural, is not a proximate consequence of the publication, in such a case, the breach of contract does not constitute special damage, not because such breach is an illegal act, but because it is not a natural and proximate consequence of the publication.[2] Where the defendant published language concerning one, an actress, in the employ of another, the proprietor of a

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damage in consequence of the refusal of any persons to perform their lawful contracts with him, it is damage which may be compensated in action brought by the plaintiff against those persons; and the law supposes that, in such actions, the plaintiff would receive a full indemnity." The authority of both these cases has been very much questioned, see Collins *v.* Cave, 4 Hurl. & N. 225; 6 *id.* 131; Walker *v.* Goe, 3 *id.* 395; 4 *id.* 351; Green *v.* Button, 2 Cr. M. & R. 707.

[1] Moody *v.* Baker, 5 Cow. 351.

[2] There are many cases where a recovery has been had for illegal acts of third persons induced by the defendant's act, as for preventing workmen from continuing their work, enticing away wives, servants, apprentices, or tenants, &c. See in note p. 58, *ante*, and Green *v.* Button, 2 Cr. M. & R. 707; Lumley *v.* Gye, 2 Ell. & Black. 216. See § 206, *post*.

theatre, in consequence of which such employee refused to fulfill her engagement with her employer (the plaintiff), and whereby the plaintiff, as he alleged, lost profits in his business, it was held that the action could not be maintained.[1] That the damages were too remote is usually assigned, and is one of the expressed grounds for the decision; another and a sufficient ground would be, that her refusal to fulfill her engagement was not a natural result of the publication.

§ 202. Ordinarily the repetition (§ 112) of defamatory language by another than the first publisher is not a natural consequence of the first publication, and therefore except under circumstances to be presently referred to, the loss resulting from the repetition of defamatory language does not constitute special damage, and is not attributable to the first publisher.[2] Thus where it was alleged that defendant said of plaintiff, "He is a rogue and a swindler; I know enough about him to hang him," and it was alleged as special damage that one B. who was about to sell goods to plaintiff on credit had by reason of *defendant's* representation refused to trust plaintiff; on the trial the proof was that defendant spoke the words to one C., who repeated them to B., and that it was in consequence of that repetition, and nothing else, that B. refused to trust plaintiff, it was held the defendant was not liable for the consequences of the repetition, and that the plaintiff could not recover.[3] In Perkins *v.* Scott, the de-

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[1] Ashley *v.* Harrison, 1 Peake's Cas. 194. In an action for fraudulently selling plaintiff diseased sheep, held it was not special damage that in consequence of a report that plaintiff had purchased defendant's diseased sheep, one A. refused to complete a contract he had with plaintiff for a supply of meat, or that plaintiff's customers had left him. (Crain *v.* Petrie, 6 Hill, 523.) See observations in Kendall *v.* Stone, 5 N. Y. 20, and note to § 206, *post.*

[2] Stevens *v.* Hartley, 11 Metc. 542; Olmstead *v.* Brown, 12 Barb. 657; Keenholts *v.* Becker, 3 Denio, 346; Terwilliger *v.* Wands, 17 N. Y. 58; Dixon *v.* Smith, 5 Hurl. & N. 450; Barnett *v.* Allen, 1 Fost. & F. 125, and note 1, p. 148, *ante.*

[3] Ward *v.* Weeks, 7 Bing. 211. The decision seems to have been put on the ground

fendant charged Mrs. Perkins with adultery; she communicated this fact to her husband, and he in consequence refused to cohabit with her.[1] It was held that no action could be maintained, for although loss of *consortium* of husband or wife may constitute special damage (§ 198) yet under the circumstances the defendant was not liable. In some instances the circumstances of the case may be such as render the repetition of the language by another than the first publisher a link in the chain of natural consequences of the first publication, and the loss by such repetition to the person whom the language concerns a natural and proximate consequence of the first publication, and therefore special damage for which the first publisher is responsible. Where a police magistrate, after disposing of a charge before him, said to a police officer (the plaintiff) who had been examined as a witness in the matter, that he was not to be believed, and this being heard by another officer present was by him reported to the plaintiff's employers, the police commissioners, and they in consequence dismissed the plaintiff from their employment, it was held, in an action against the magistrate, that such dismissal was special damage.[2] Where the plaintiff was governess in the family of A., and the defendant published language to the plaintiff's father imputing to her having had a child by A., this language the plaintiff's father repeated to A., who thereupon dismissed her from his service, alleging as a reason that although he

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of a variance, the allegation being that the injury was in consequence of a publication by the defendant and the proof being that the injury was in consequence of a publication by another. Where words were spoken to a servant of the plaintiff imputing incontinence to the plaintiff, and the plaintiff alleged for special damages that in consequence of the words J. S. who was in communication of marriage with her refused to marry her, the plaintiff failed to sustain her action, because the words were not spoken to J. S. (Holwood *v.* Hopkins, Cro. Eliz. 787.) In Moody *v.* Baker, 5 Cow. 351, it was held that the declarations of the man that he was not influenced in his refusal to marry by the words published, were not admissible.

[1] 1 Hurl. & Colt. 153; s. c. Perkins *v.* Scott, 6 Law Times, N. S. 394.

[2] Kendillon *v.* Maltby, 1 Car. & Marsh. 402.

knew the charge to be false, it would be injurious to the plaintiff and would be unpleasant both to the plaintiff and himself A. that she should remain in his family, it was held that the dismissal was a natural consequence of the defendant's first publication, for which he was liable.[1] And so where the plaintiff was a clerk in the employ of C. & S., who were partners, and the defendant, a former employer of plaintiff, published to C., one of said partners, language imputing dishonesty to the plaintiff, this language C. repeated to S., his partner, and it was held the defendant was liable for the consequences of the repetition.[2] In each of the two cases lastly referred to, the court evidently having in view the supposed rule of law above referred to (§ 201), that special damage must be a *legal* consequence of the act complained of, lays a marked stress upon the fact that the repetition was privileged, that is to say that the father in the one case and the employer and partner in the other, was justified in making the repetition, and that in neither case could the plaintiff have maintained an action against the one making the repetition, and the whole tenor of these decisions lead to the inference that unless the repetition had been justifiable as regards the person making it, the defendant would not have been responsible for its consequences.[3] The repetitions, however, were justifiable only in part; they were justifiable as to the persons making them, but not as to the first publisher; they illustrate the principle (§§ 67, 121) that the actual publisher may not be liable, while another, not the actual publisher, is liable. In the case of

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[1] Gillett *v.* Bullivant, 7 Law Times, 490, and see Derry *v.* Handley, 16 Law Times N. S. 263; *ante*, § 114, and note 2, p. 296, *ante*.

[2] Fowles *v.* Bowen, 30 N. Y. 22.

[3] "Occasions may doubtless occur where the communication of slanderous words by a person who heard them will be *innocent;* and it is certainly reasonable that when repeated on such an occasion and damages result, the first speaker should be held responsible for the damages as flowing directly and naturally from his own wrong." (Terwilliger *v.* Wands, 17 N. Y. 58, cited Fowles *v.* Bowen, 30 N. Y. 22.)

Ward *v.* Weeks, above referred to, the court dwelt on the fact that the defendant had not requested the person to whom he made the publication to repeat the language, intimating, indirectly at least, that if the defendant had made such a request he would have been liable for the repetition; most probably that would have been the result,[1] but such a request would not have justified the repetition (§ 67). It seems plain, therefore, that it is not the fact of the repetition being or not being justifiable that determines the liability of the first publisher, but the test in every case must be whether or not the repetition was a *natural* consequence of the first publication. It was natural and to be expected that a father, when told of the seduction of his daughter, should seek out the supposed seducer and tax him with his offense; it was natural and to be expected that a partner, when informed that one in the employ of himself and partner was dishonest, should communicate the information to his copartner, therefore it was that in both cases the first publisher was held to be liable for the repetition. Nor is there any inconsistency between these decisions and the decision in Perkins *v.* Scott, *supra*, for in that case although the repetition by the wife to her husband was a natural result of defendant's act, yet the husband's refusal, on that account, to consort with his wife was not a natural consequence of the repetition. The husband being the legal protector of his wife, the natural consequences of her appeal to him would have been not to aggravate but to seek to redress her injury. The husband's desertion of the wife was not, therefore, under the circumstances, a natural consequence of the defendant's act. There was this additional difficulty in the way of a recovery in that action: the damage for which the plaintiff sought compensation was really done by himself.

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[1] Keenholts *v.* Becker, 3 Denio, 346.

§ 203. We have already (§ 130) adverted to a distinction between language concerning a person and language concerning a thing. Thus far, in this chapter, we have confined ourselves exclusively to language concerning a person; our present business is with language concerning things. As respects language concerning things, no such distinction exists between the effect of oral and written language, as is maintained with respect to language concerning persons (§ 18). By things we intend whatever is external to the person; therefore, as here used, things include whatever one may or may be entitled to own, possess, or enjoy; also, his actions and creations.

§ 204. As a thing has no rights, and as no one owes any duty to a thing (§ 38), no wrong can be done to a thing, and language which merely concerns and affects a thing cannot be actionable. In other words, one may, *in good faith*, speak or write whatever he may please concerning a thing, and with any intention towards the thing, and for such speaking or writing no action can be maintained. The thing cannot complain; it has no right which can be invaded. But although things have no rights, persons may have a right in or to a thing, the right of property, and this right may be invaded by language concerning the thing. When this invasion occurs, the language which affects a thing is actionable. A loss of or injury to the property is not an invasion of the right of property, unless the loss is occasioned by a wrongful act (§§ 48, 49). A loss occasioned by a lawful act does not amount to a wrong, and does not confer a right of action (§ 62). Where, therefore, by reason of an exercise of the right of speech or of writing concerning a thing, the owner of the thing sustains a loss, he cannot have any redress therefor, as no wrong has been done. Thus an action cannot be maintained by a manufacturer or dealer for language charging that the article he manufactures, or

in which he deals, is not a good article, or is a bad article, or is not so good as, or is inferior to, an article manufactured or sold by some other person.[1] But rights must be exercised in good faith: bad faith in an act done in the assumed exercise of a right makes the act wrongful (§§ 40, 42). Good faith, in this connection, means an *honest belief in the truth and fitness* for the occasion of the matter published, and bad faith is the converse of this; namely, the absence of such honest belief, or the *disbelief in the truth and fitness* for the occasion of the matter published. As, then, the existence of this *belief* or of this *disbelief* determines whether the publication was or was not made with a legal excuse, it becomes necessary to ascertain the belief of the publisher; and this involves the question of his intent in making the publication. Not as already explained (§§ 90, 91), because the intent is essential to constitute a cause of action, but because it is a link in the chain of evidence of the existence or of the absence of a legal excuse. Proof that the publisher, while pretending to exercise the right of speaking or writing concerning a thing, was in reality designing and intending to injuriously affect the owner of the thing, while it would not of itself constitute bad faith, would be a circumstance from which bad faith might properly be inferred. Although the language concerns only a thing, yet if it appears to have been published without lawful excuse, *i. e.* maliciously (§ 91), it will be actionable if pecuniary loss is a necessary or natural and proximate consequence of the publication, and hence we may deduce this rule, that language concerning a thing is actionable when published maliciously, *i. e.* without lawful excuse (§ 91), if it also occasions damage to the owner of the thing (§ 146).[2]

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[1] Tobias *v.* Harland, 4 Wend. 537; Young *v.* McCrae, 3 Best & Sm. 264; 7 Law Times, N. S. 354; Carr *v.* Duckett, 5 Hurl. & N. 783.

[2] "I am far from saying if a man falsely and maliciously makes a statement

§ 205. Malice and damage are both essential requisites to sustain an action for language concerning a thing. To these requisites is usually added a third, that the language

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disparaging an article which another manufactures or vends (although in so doing he casts no imputation on his personal or professional character), and thereby causes an injury and special damage is averred, an action might not be maintained." (Cockburn, C. J., Young *v.* McCrae, 3 Best & Sm. 264.)

In Swan *v.* Tappan, 5 Cush. 105, the words were "alleged to be of and concerning the plaintiff's books," and nothing else, without any allegation of special damage. The action was held not maintainable, but the court intimated that if special damage had been alleged the action could have been sustained. In Ingram *v.* Lawson (6 Bing. N. C. 212; 8 Scott, 471), it was held that the language was concerning the plaintiff personally, but that if the language had been concerning the plaintiff's ship, the action could have been maintained if special damage had been alleged. And as to words reflecting on a steamboat, see Hamilton *v.* Walters, 4 Up. Can. Q. B. Rep. O. S. 24, and in Yates' Pleadings and Forms, p. 436, is the form of a plea to a declaration for slander of the plaintiff's ship. In Young *v.* McCrae (3 Best & Sm. 264), Cockburn, J., observed: "I am far from saying there can be no action for a *false* reflection on goods. Such an action, however, would be more in the class of actions for false representations than actions of libel." An intentional false statement by defendant in regard to articles, manufactured by plaintiff, for the purpose of preventing sales, by plaintiff, of such articles, and thereby preventing such sales, constitutes a cause of action. (Snow *v.* Judson, 38 Barb. 212, citing Benton *v.* Pratt, 2 Wend. 385; White *v.* Merritt, 7 N. Y. 352; Gallager *v.* Brunel, 6 Cowen, 346.)

A declaration for libel stated that the plaintiff, before and at, &c., carried on the business of an engineer, and was the inventor and registered proprietor (under 2 & 3 Vict., c. 17) of an original design for making impressions on metal articles, and sold divers articles on which the design was used. That plaintiff, before and at, &c., had sold and had on sale in the way of his said trade, articles and goods called "self-acting tallow syphons, or lubricators," and that defendant published a libel of and concerning plaintiff, and of and concerning him in his said trade, and of and concerning said design, and plaintiff as the inventor, &c., thereof, and manufacturer of the articles with the said design thereon, and of and concerning the said goods which he had so sold and had on sale, and plaintiff as the seller, as follows: "This is to caution parties employing steam power, from a person" (meaning plaintiff) "offering what he calls self-acting tallow syphons or lubricators" (meaning said design, and meaning said goods and articles which he, plaintiff, had so sold and had on sale as aforesaid), "stating that he is the sole inventor, manufacturer, and patentee, thereby monopolizing high prices at the expense of the public." R. Harlow (meaning defendant), "takes this opportunity of saying, that such a patent does not exist, and that he has to offer an improved lubricator," &c. "Those who have already adopted the lubricators," (meaning, &c., same innuendo as before), "against which R. H. would caution, will find that the tallow is wasted instead of being effectually employed as professed." No direct averment connected the tallow syphon with the registered design mentioned in the first part of the inducement. No special damage was alleged. Held, that the words were not a libel on the plaintiff, either generally or in the way of his trade, but were only a reflection upon the goods sold by him,

must be false. It is true the language must be false, not because it is an additional requisite to malice and damage, but because it is comprised in the requirement of damage. Language concerning a thing which is not false, *i. e.* which is true, cannot, as a necessary or natural consequence, occasion pecuniary loss. Language concerning a thing is *prima facie* or presumptively lawful; and, therefore, with regard to it, there is neither any assumption or presumption of its being untrue or false, nor of its occasioning damage, nor of its being without lawful excuse (malicious) (§ 130); and therefore it is, that one complaining of an injury by reason of language concerning a thing, in order to establish his right to maintain an action, has to allege and prove that the publication was made without lawful excuse (maliciously), that the language was untrue, and that he has sustained pecuniary loss as a necessary or as a natural and proximate consequence of the publication.

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which was not actionable without special damages. (Evans *v.* Harlow, 5 Q. B. 624.) See *post*, note 5, p. 316.

Publishing of a newspaper that it was a vulgar, ignorant, and scurrilous journal, was held not actionable, but it was held actionable to say that it was low in circulation—such a charge being calculated necessarily to produce damage. (Heriot *v.* Stuart, 1 Esp. Cas. 437.) See Latimer *v.* West. Morning News Co., 25 Law Times, N. S. 44.

Plaintiff was possessed of certain shares in a silver mine, touching which shares certain claimants had filed a bill in chancery, to which plaintiff had demurred. Held, that, without alleging special damage, plaintiff could not sue the defendant for falsely publishing that the demurrer had been overruled; that the prayer of the petition (for the appointment of a receiver) had been granted, and that persons duly authorized had arrived at the mine. Held, also, that an allegation that the plaintiff was injured in his rights, that the shares were lessened in value, that divers persons believed that he had no right to the shares, that the mine could not be worked, and that he had been prevented from disposing of his said shares, and from working the mine in so ample a manner as he otherwise would have done, and was prevented from gaining divers profits which would otherwise have accrued to him, was not a sufficient special damage. (Malachy *v.* Soper, 3 Bing. N. C. 371; 3 Scott, 723.)

In an action for misdescribing the plaintiff's vessel in a publication of the defendants, called "The Shipping Register," it appearing that the plaintiffs had requested the surveyor of the defendants to examine the ship, held that they could maintain no action against them for what they did in consequence of his report, the remedy was against him if he made a false report. (Kerr *v.* Shedden, 4 C. & P. 528.)

The foregoing cases seem to imply that the fact of loss, or special damage, as it is

§ 206. What is ordinarily designated slander of title, is comprised within the division of language concerning things. Slander of title is publishing language, not of the person, but of his right or title to something. All the preceding observations upon language concerning things apply to actions for slander of title; thus, in an action for slander of title, no distinction is made with regard to the medium of the publication, as whether oral or written;[1] and to sustain the action, the publication must be made maliciously; the language must be false, and must occasion, as a natural and proximate consequence, a pecuniary loss, *i. e.* special damage to the plaintiff.[2] The special damage[3] usually consists in losing the sale of the property in question. This damage can occur only in the cases where no contract to sell exists, *i. e.* to cases where one is, by the language published, deterred from making a purchase, or entering into a contract to

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termed, will render actionable language concerning a thing; we state it otherwise in the text, and we suppose it to be otherwise. In Carr *v.* Hood, 1 Camp. 355, n., Lord Ellenborough, speaking of language concerning a thing (a book), says: "I speak of fair and candid criticism; this every one has the right to publish, although the author may suffer loss from it. Such a loss the law does not consider as an injury, because it is a loss which the party ought to sustain."

This subject is further considered under the head of Defenses, § 254.

[1] Malachy *v.* Soper, 3 Bing. N. C. 371; 3 Scott, 723.

[2] Kendall *v.* Stone, 5 N. Y. 14, rev'g s. c. 2 Sandf. 269; Like *v.* McKinstry, 41 Barb. 186; aff'd 4 Keyes, 397. There must be malice which the plaintiff must prove. (Smith *v.* Spooner, 3 Taunt. 246; Hill *v.* Ward, 13 Ala. 310; Stark *v.* Chetwood, 5 Kansas, 141.) Malice is not to be presumed. (McDaniel *v.* Baca, 2 Cal. 326.) There must be malice either express or implied. (Hargrave *v.* Le Breton, 4 Burr. 2422.) But all malice is implied. (§ 87, *ante.*) To support an action for slander of title, special damages must be shown. (Bailey *v.* Dean, 5 Barb. 297; Linden *v.* Graham, 1 Duer, 670; Watson *v.* Reynolds, 1 Mo. & Malk. 1; Paull *v.* Halferty, 63 Penns. 46, and note 2, p. 315, *post.*) There must, too, be a want of probable cause; and, if what the defendant said or did, was in pursuance of a claim of title, for which he has some ground, he is not responsible. (Bailey *v.* Dean, 5 Barb. 297.) The existence of probable cause is no answer to the action, nor does the want of it necessarily prove malice. (Kendall *v.* Stone, 2 Sand. 269.) Mere assertions, threats, and designs, made against a grantee of real estate, and against the party in possession, cannot be deemed a cloud upon the title. If the owner is injured by any such false claims or representations, he can probably maintain an action for damages. (*Re* Madison Ave. Bapt. Church, 26 How. Pra. R. 72.)

[3] Kendall *v.* Stone, 5 N. Y. 14; Paull *v.* Halferty, 63 Penns. 46.

purchase. Where a contract for sale and purchase has already been entered into, the purchaser's refusal, on account of any statement of a third party, to complete his contract, would not in an action against such third party, for making such statement, constitute special damage! A man may refuse to bid for property upon which, or upon the title to which, an imputation rests, such refusal is a *natural consequence* of the imputation, but one who is already under a contract to purchase may not (has not the right to), by reason of any imputation on the subject of such contract, refuse to complete, besides that his refusal would be illegal, it would not be a *natural consequence* of the imputation. Perhaps this rule is applicable only to the slander of title to real estate, and in the cases where the title is capable of such clear proof as to outweigh any imputation against it, but in the case of title to personal property the title to which is not capable of such satisfactory proof as is the title to real property, a different rule may prevail, for in such a case it would seem to be but a *natural consequence* that one under contract to purchase should be deterred from completing by reason of imputations upon the seller's title, just as in the case of the contract to deliver battens the seller was deterred from delivering them by reason of the defendant's claim of lien.[1] (§ 206*b*.)

§ 206*a*. Where the assignee of a lease which contained a proviso for re-entry in case the rent reserved by it was in arrear, exposed the lease for sale, there being at the time rent in arrear, the lessor appeared at the time and place appointed for the sale, and announced that such assignee had no title and could not make a title, in consequence of which announcement, persons who came to bid for the lease refused to bid; the lessor afterwards offered £100 for the lease, which was refused; he brought eject-

[1] Green *v.* Button, 2 Cr. M. & R. 707. See § 201, *ante*.

ment and recovered the possession of the premises. Intermediate the attempted sale and the recovery in the ejectment, the assignee sued the lessor for slander of title; the court on the trial was of opinion that, under the circumstances, the plaintiff could not maintain the action, but left the question of malice in making the publication to the jury, and they found that it was malicious. The court, however, directed a nonsuit.[1] It is supposed that the nonsuit was set aside, and that the plaintiff had judgment on the ground that the question of malice having been left to the jury as a question of fact, and found against the defendant, the court could not disregard the finding and say there was no malice.[2] The defendant, a surveyor appointed under Stat. 7 and 8 Vict., ch. 84, attended a sale of some unfinished houses, of which the plaintiff was the lessee for a term of years. The roadway to these houses, although of sufficient width according to the above statute, was at that time in an unpaved state and unfit for traffic. At such sale the defendant made the following announcement: "I shall not allow the houses to be finished until the roads are made good. I have no power to compel any one to make the roads, but I have power to stop the buildings until the roads are made." Some time after such sale, the defendant, on being asked why he pursued Mr. Pater, replied, "I pursue Mr. Pater because I am not able to pursue Mr. Agar, the ground landlord." Upon this state of facts, held, that there was no evidence to support the allegation of malice.[3] Where one mortgaged his estate, and afterwards committed an act of bankruptcy, subsequently the property was

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[1] Smith *v.* Spooner, 3 Taunt. 246. The attorney of a party who would be justified in making objections to a title, is not liable to an action, if he *bonâ fide*, though without authority, state only what his principal might have stated. (Watson *v.* Reynolds, 1 M. & Malk. 1.)

[2] 1 Starkie on Slander, 318.

[3] Pater *v.* Baker, 11 Jurist, 370; 16 Law Jour. R. 124 C. P.; 3 C. B. 831.

offered for sale by the assignee of the mortgagor, the defendant, the attorney of the mortgagee, stopped the sale by stating that the mortgagor had committed an act of bankruptcy, and which was untrue, that a docket had been out for a commission, in an action for losing the sale, held that although the defendant went beyond the truth, there was no material variance and no difference made with respect to plaintiff's title, and there being no proof of malice, the action could not be maintained.[1] The plaintiff being about to sell an estate, the defendant wrote a letter to the intending purchaser, imputing insanity to Y., the person from whom the plaintiff derived his title, and stating that the title would be disputed; in consequence of which letter the proposed purchaser refused to purchase. It appeared on the trial that Y. had married a sister of the defendant, and that a term of years in the estate in question was vested in the defendant as trustee, to secure a jointure to Y.'s wife. The judge on the trial ruled that if defendant believed, upon *such grounds as would persuade a man of sound sense and knowledge of business*, that Y. was insane, the defendant would be entitled to a verdict. A verdict was taken for the plaintiff; the court above, on granting a new trial, condemned this ruling as unsound, and stated, "If what the defendant wrote was most untrue, but nevertheless *he believed it*, if he was acting under the most vicious of judgments, yet if he exercised that judgment *bonâ fide*, it was a sufficient justification. * * The jury must arrive at their conclusion through the medium of malice or no malice in the defendant. The *bonâ fides* of the publication, and not what a man of rational understanding would have done, is the question to be canvassed."[2] The defendant, who was the ground landlord and remainder man of leasehold

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[1] Hargrave *v.* Le Breton, 4 Burr. 2422.

[2] Pitt *v.* Donovan, 1 M. & Sel. 639.

premises, of which the plaintiff was assignee of the lessee, stated at an auction at which the lease and assignment were put up for sale, that *all* the covenants in the lease had been broken, that he had commenced ejectment to recover the possession of the premises, and that it would cost £70 to repair the premises, in consequence of which the lease brought less than it otherwise would. On the trial it appeared that *some only* of the covenants in the lease had been broken, and the judge directed the jury, that the only question was, whether what the defendant stated was untrue, and if it was, the plaintiff was entitled to recover. The jury found for plaintiff, and gave £40 damages. On motion for a new trial, the ruling at the trial was held erroneous, and that the proper question was, whether so much of the defendant's statement as was false was also malicious.[1] Where the plaintiff, as administratrix, was about to sell leasehold property; defendant, after being informed by the attorney of the plaintiff that there was no will of the decedent, issued an advertisement, offering a reward for the will of such decedent, held the question was whether he had "a sincere and genuine belief that there was a will."[2] A. died possessed of furniture in a beer-shop. His widow, without taking out administration, continued in possession of the beer-shop for three or four years, and then died, having whilst so in possession assigned all the furniture by bill of sale to her landlords by way of security for a debt she had contracted with them. After the widow's death, the plaintiff took out letters of administration to the estate of A., and informed the defendant, the landlord's agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently the plaintiff was about to sell the furniture by auction, when the defendant interposed to

[1] Brook *v.* Rawl, 4 Exch. 521, and see Goulding *v.* Herring, 1 Rolle R. 141.

[2] Atkins *v.* Perrin, 3 Fost. & F. 180.

forbid the sale, and said that he claimed the goods for his principals under a bill of sale. On proof of these facts, in an action for slander of title, the plaintiff was non-suited: held, that the mere fact of the defendant's having been told before the sale that the bill of sale was invalid, was no evidence of malice to be left to the jury, and that the plaintiff was, therefore, properly non-suited.[1] An order having been made by the Court of Chancery, requiring G., the plaintiff, to pay a sum of money, the defendant registered the order pursuant to Statute 1 and 2 Vict., ch. 110, whereby it became a lien on the real estate of the plaintiff, and prevented him raising, by a sale or mortgage of his estate, the money ordered to be paid, held the action could not be maintained, there being no proof of malice.[2] And where the defendant published a notice cautioning all persons not to purchase of the plaintiff a certain tract of land, alleging that the plaintiff obtained the title to said land from the defendant by means of false pretences, and that the defendant intended to institute a suit to annul plaintiff's pretended title, was held not on its face to show malice.[3]

§ 206*b*. Some of the old cases hold that one claiming title in himself cannot give a right of action, that to render the charge actionable it must assert a title in a stranger.[4] This distinction no longer prevails. So formerly it seems to have been supposed that the only ground of damage was a loss of the sale or leasing of the property, the title to which was assailed; it is, however, well settled at this day that any damage which is a nat-

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[1] Steward *v.* Young, Law Rep. V, 122 C. P.

[2] Gibbs *v.* Pike, 1 Dowl. N. S. 409; 6 Jur. 465.

[3] McDaniel *v.* Baca, 2 Cal. 326.

[4] Jenkins Cent. 247; Pennyman *v.* Rabanks, Cro. Eliz. 427; s. c., Mo. 410; Lovett *v.* Weller, 1 Rolle R. 409; Gerard *v.* Dickinson, 4 Rep. 18; Sneade *v.* Badley, 3 Buls. 75; s. c., 1 Rolle R. 244; and see Vin. Abr. Act. for Words, L. (B. 2), 8; Anon. Sty. 414; Boulton *v.* Shields, 3 Up. Can. Q. B. 21.

ural and proximate consequence of the language will support an action.[1] The action cannot be maintained unless there is *special* damage.[2] Where, prior to the publication of the language complained against, the plaintiff and one W. had contracted for the sale of a lot of land—in consequence of the publication, W. wished to be released from his contract, and plaintiff released him—plaintiff sued, charging the loss of a sale to W. as the special damage, held that the rescinding of the contract with W. was not special damage, and that no action could be maintained.[3] But where plaintiff had borrowed a sum of money of defendant, and afterwards plaintiff bought spruce battens of A. Before delivery of the battens, defendant gave notice to A. not to deliver them, and that he, plaintiff, had a lien upon them. In an action by plaintiff, alleging that the defendant falsely claimed such lien, and that by reason of such notice and pretence of lien and non-delivery of said battens, he had lost the use of them, and been hindered in building certain houses, it was objected that there being a valid contract with A. if plaintiff had suffered any damage by reason of the non-delivery of the battens, he must look to A. That the non-delivery was an illegal act for which the defendant was not liable, but the court held otherwise, and sustained the action.[4] Perhaps plaintiff being prevented from raising money by mortgage on his lands, is such damage as may entitle him to maintain an action.[5] Where the alleged slander con-

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[1] Malachy *v.* Soper, 3 Bing. N. C. 371; 3 Sc. 723; Tasburgh *v.* Day, Cro. Jac. 485.

[2] Watson *v.* Reynolds, 1 Mo. & Malk. 1; Lowe *v.* Harwood, Sir W. Jones, 196; s. c., Cro. Jac. 140; Pal. 529; Cane *v.* Goulding, Sty. 169; Sneade *v.* Badley, 3 Bulst. 75; s. c., 1 Rolle R. 244; Brook *v.* Rawl, 4 Exch. 521; Pater *v.* Baker, 3 C. B. 831, and *ante*, in note 3, p. 309.

[3] Kendall *v.* Stone, 5 N. Y. 14, rev'g s. c., 2 Sandf. 269.

[4] Green *v.* Button, 2 Cr. M. & R. 707.

[5] Linden *v.* Graham, 1 Duer, 670. In that case the action was not maintained, erroneously, as we suppose, because the damage was not stated with sufficient cer-

sists in the defendant claiming title in himself, the fact of his not having a title is not *per se* evidence of malice.[1] But the defendant having no title is a circumstance from which malice may be inferred.[2] Where the defendant in fact made the publication under the advice of counsel, but did not at the time of making the publication, state that he was acting under such advice, held that the fact of his acting under such advice did not *per se* shield him from an action;[3] but it was a circumstance to be considered in determining whether or not the publication was made maliciously.[4]

§ 206*c*. The action for slander of title is not restricted to language affecting real property, it lies for slander of title to personal property; thus, where at a public sale of rye the defendant attended, and in the presence and hearing of the persons there assembled, said: "I forbid selling the rye; it is mine," in consequence of which persons were deterred from bidding, and the rye sold for less than it would otherwise have done, it was held an action could be maintained.[5]

§ 207. As one cannot cloak his wrong-doing by the use

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tainty. The want of certainty was a ground for making the complaint more definite, but not, as we think, for holding the complaint insufficient. As to how the damage must be alleged, see Malachy *v.* Soper, 3 Bing. N. C. 371; Tilk *v.* Parsons, 2 Car. & P. 201; Delegal & Highley, 8 Car. & P. 444. A general allegation that the plaintiff's property has been lessened in value, or that people believe he has no title, or that he has been prevented from selling, is not sufficient. (See §§ 329, 369, *post.*)

[1] Hill *v.* Ward, 13 Ala. 310.

[2] McDaniel *v.* Baca, 2 Cal. 326.

[3] Like *v.* McKinstry, 41 Barb. 186; aff'd 4 Keyes, 397.

[4] Hill *v.* Ward, 13 Ala. 310.

[5] Like *v.* McKinstry, 41 Barb. 186; aff'd 4 Keyes, 397; and see Gutsole *v.* Mathers, 1 M. & W. 495; 1 Tyrw. & Gr. 694; Green *v.* Button, 1 Gale, 349; 2 C. M. & R. 707; 1 Tyrw. & G. 118; Malachy *v.* Soper, 3 Bing. N. C. 371; 3 Scott, 723; Rowe *v.* Roach, 1 M. & S. 304; Carr *v.* Duckett, 5 Hurl. & N. 783; Hill *v.* Ward, 13 Ala. 310; and slander of title to a slave. Ross *v.* Pines, Wythe, 71. An action was maintained for alleging that plaintiff's machines were an infringement on defendant's patents. (Wren *v.* Weild, Law Rep. IV, Q. B. 213.) See *ante*, note p. 307.

of ironical language (§ 133), so neither can one with impunity attack a person by *pretending* to attack a thing; for although the words may be professedly concerning a thing, yet if in reality they concern a person, they will be judged by the rules governing language concerning the person.[1] Whether certain language concerns a person or a thing is sometimes a question difficult to determine; but it is always a question of fact, and like every other question of fact, is to be determined sometimes by the court and sometimes by the jury (§ 69). The language which on its face concerns a person, may indirectly affect a person other than the person whom on its face the language concerns. It may affect one as concerning him personally, and affect another as concerning a thing. The language heretofore referred to (§ 201) concerning an actress, whereby she refused to perform her engagement, was as to her concerning the person, but as to her employer it was concerning a thing, namely, his right of property in or to her services.

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[1] Carr *v.* Hood, 1 Camp. 355, *n.* In Tobias *v.* Harland, 4 Wend. 537, the court said that words disparaging an article made or dealt in by the plaintiff, were not actionable unless they imputed deceit or malpractice in the making or vending, or a want of skill in the manufacturing. In reference to this dictum it must be observed that words imputing to plaintiff deceit or want of skill, do not concern the thing but the person, and are therefore within the rules relating to personal defamation. See Latimer *v.* West. Morning News Co., 25 Law Times N. S. 44. As to pleas in actions for slander of title, see Mair *v.* Caly, 12 Up. Can. Q. B. 71; Boulton *v.* Shields, 3 *id.* 21.

CHAPTER IX.

DEFENSES.

Privileged publications generally—Repetition—Truth—Legislative proceedings and reports thereof—Judicial proceedings—Parties to proceedings—Counsel—Witnesses—Judges—Grand jurors—Reports of judicial proceedings—Quasi judicial proceedings—Church discipline—Seeking advice or redress other than judicially—Giving information or advice generally—Attorney and client—Master and servant—Candidates for office or employment—Insanity—Drunkenness—Infancy—Accord and satisfaction—Previous recovery—Apology—Freedom of the press—Criticism.

§ 208. The actionable language referred to in the preceding chapter is to be understood as *prima facie* actionable only, that is to say, it is actionable when published without any legal excuse for making the publication.[1] We have, in previous chapters (§§ 64, 65), referred to the kinds of legal excuses, and the distinction between legal excuses and defenses, and (§ 50) stated that it is the occasion which determines of every act, and consequently of the act of publication, whether or not it admits

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[1] To every libel there may be an implied justification from the occasion. (Weatherstone *v.* Hawkins, 1 T. R. 110.) But "there are some libels it is impossible to justify." (Pollock, Ch. B., Darby *v.* Ouseley, 25 Law Jour. 227, Ex.) "Whether the circumstances under which a communication is made constitute it a privileged communication or not, is a question which the court has assumed the jurisdiction to decide. But it is more a question of fact in each particular case than a question of law. The court is to consider whether the occasion is such as to make the communication one of a privileged character. That being so, it by no means follows that we can derive much aid in one case from another, the circumstances of which are not exactly the same." (Maule, J., Wenman *v.* Ash, 13 C. B. 836); and see Darby *v.* Ouseley, 1 Hurl. & N. 1.

of a legal excuse or defense. When the occasion really or apparently furnishes a legal excuse for making the publication, in that event the publication is termed a privileged publication (§ 120), or a privileged communication. Privileged publication is the better term, because the phrase privileged communication has another meaning, namely, a communication made under circumstances which either entitles or obliges the person to whom the communication is made to withhold the disclosure of the matter communicated.[1] The term privileged communication, when hereafter employed, will be as a synonym for privileged publication.

§ 209. Privileged publications are usually divided into absolutely privileged and conditionally privileged.[2] By an absolutely privileged publication is not to be understood a publication for which the publisher is in no wise responsible, but it means a publication in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action of slander or libel. A conditionally privileged publication is a publication made on an occasion which furnishes a *prima facie* legal

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[1] As to the distinction between communications privileged from being given in evidence and privileged from being a cause of action for slander or libel, see remarks of Bushe, C. J., Black *v.* Holmes, 1 Fox & Sm. 35.

[2] Perkins *v.* Mitchell, 31 Barb. 467; Warner *v.* Paine, 2 Sandf. 198. Privileged communications are of four kinds, to wit: where the publisher of the alleged slander acted in good faith in the discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests; anything said or written by a master concerning the character of a servant who has been in his employment; words used in the course of a legal or judicial proceeding; and publications duly made in the ordinary mode of parliamentary proceedings. (White *v.* Nichols, 3 How. U. S. Rep. 266.) Absolutely privileged communications are of two kinds: (1.) proceedings in courts of justice; (2.) memorials and petitions to the legislature. (Cook *v.* Hill, 3 Sandf. 341.) Courts are not inclined to extend the doctrine of absolutely privileged communications. (*Id.*) A conditionally privileged publication must be made "in good faith, believing the statements it contains to be true, or having probable cause to believe th m to be true." If there was no probable cause for the communication, the law implies that it was made with malice. If, however, it appears that there was probable cause, the communication is privileged, no matter how much actual malice dictated it. (*Id.*)

excuse for the making of it; and which is privileged unless some additional fact is shown, which so alters the character of the occasion as to prevent it furnishing a legal excuse. The additional fact which, in the majority of cases, is required to be shown to destroy this conditional privilege is malice, meaning bad intent, in the publisher, *i. e.* an intent to injure the person whom or whose affairs the language concerns; and, therefore, by a conditionally privileged publication is very generally understood one which rebuts the presumption of malice, meaning absence of legal excuse, which in cases where no legal excuse is apparent, arises from the mere fact of publication.[1] And, therefore, it has been said: "Instead of the expression 'privileged communication,' it is more correct to say that the communication was made on an occasion which rebuts the presumption of malice."[2] The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the com-

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[1] "In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his (the publisher's) own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defense depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits." (Parke, B., Toogood *v.* Spyring, 1 Cr. M. & R. 181; 4 Tyr. 582; and to the like effect see Coxhead *v.* Richards, 2 C. B. 569; Blackham *v.* Pugh, 2 C. B. 611; Bennett *v.* Deacon, 2 C. B. 628; Taylor *v.* Hawkins, 16 Q. B. (Adol. & El. N. S.) 308; Kine *v.* Sewall, 3 M. & W. 297; Swan *v.* Tappan, 5 Cush. 104.)

[2] Erle, J., Gilpin *v.* Fowler, 9 Ex. 615.

munication was made.[1] The description of cases recognized as privileged communications must be understood as exceptions to the rule (that every defamatory publication implies malice), and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and, therefore, *prima facie* relieves it from the just implication from which the general rule of law is deduced. The rule of evidence as to such cases is, accordingly, so far changed as to impose it on the plaintiff to remove those presumptions, flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct.[2] And it has been said: Few rules of law are of greater practical importance than that which requires proof of express malice, where the words are spoken under circumstances which make the communication privileged. The malice required to deprive communications of this sort of the protection arising out of the occasion of the speaking of the words, must be such as to induce the court, or any reasonable person, to draw the inference that the occasion has been taken advantage of to give utterance to an unfounded charge.[3] Privileged communications comprehend all statements made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them,[4] or the interest of the person to whom they are made.[5] A communica-

[1] Wright *v.* Woodgate, 2 Cr. M. & R. 573. Where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has by his situation to protect the interest of that person, that which he writes under such circumstances is a privileged communication, and no action will lie for what is thus written, unless the writer be actuated by malice. (Cockayne *v.* Hodgkisson, 5 Car. & P. 543.)

[2] White *v.* Nicholls, 3 How. U. S. Rep. 266.

[3] Manby *v.* Witt, 18 C. B. 544.

[4] Somerville *v.* Hawkins, 10 C. B. 583; 15 Jur. 450.

[5] Pattison *v.* Jones, 8 B. & C. 578.

cation made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has *a duty*, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable. But in this definition of a privileged communication, the word *duty* "cannot be confined to legal duties, which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation."[1] But, as was said by Creswell, J.:[2] "It is not easy very precisely to define what is, and what is not, a privileged communication." We venture, with much hesitation, to suggest the rule as to privilege to be: one may publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights, or to the rights of another, provided the publication be not *unnecessarily* made to others than to those persons whom the publisher honestly believes can assist him in the protection of his own rights, or to those whom he honestly believes will, by reason of a knowledge of the matter published, be better enabled to assert, or to protect from invasion, either their own rights, or the rights of others entrusted to their guardianship (§ 241).

§ 210. It will be convenient, prior to considering the several occasions which give rise to privileged publications, to discuss the supposed privilege under certain conditions of *repeating* defamatory matter. It already appears that the publication of defamatory matter cannot be justified on the ground that it is but a repetition (§ 114).[3]

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[1] Harrison *v.* Bush, 5 El. & Bl. 349.

[2] Wenman *v.* Ash, 13 Com. B. 844.

[3] One who repeats a slander is responsible. (Evans *v.* Smith, 5 Monr. 363; Kennedy *v.* McLoughlin, 5 Gray, 3; Clarke *v.* Munsell, 6 Metc. 373; Hampton *v.* Wilson, 4 Dev. 468.) It is no defense to an action for defamatory matter published in a newspaper that it was the communication of a correspondent, or copied from another

For a long period, however, it was tacitly conceded that such a repetition could be justified by declaring the name of the previous publisher. The origin of the error is generally attributed to a dictum in the Earl of Northampton's case, A. D. 1613.[1] That case was an information under the statutes of *scandalum magnatum* in the Star Chamber, against Goodrich, Cox, Varner, Minor, Lake, and Ingram, for publishing defamatory language concern-

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newspaper. (Talbutt *v.* Clark, 2 Moo. & R. 312; Sanford *v.* Bennett, 24 N. Y. 20; Miles *v.* Spencer, 1 Holt R. 533; Parker *v.* McQueen, 8 B. Monr. 16) or that it had been previously published, and the plaintiff had failed to prosecute the previous publisher (Rex *v.* Holt, 5 T. R. 436; Curtis *v.* Mussey, 6 Gray (Mass.), 261; see Poppenheim *v.* Wilkes, 1 Strobhart, 275); or that when the charge was made, the plaintiff did not deny it. (Fuller *v.* Dean, 31 Ala. 654.) In Reg. *v.* Newman, 1 El. & Bl. 268, the defendant on the trial offered to put in evidence the Dublin Review, of a date prior to the alleged libel, in order to show that the charge contained in the libel had been published a considerable time before the alleged libel, and that the publisher had not been prosecuted; this evidence was rejected, and the rejection was made one of the grounds for a motion for a new trial, and per Coleridge, J., "It has been said that probably the libel was true because another libel was published by another person. Upon that principle, it might have been argued that the statements in the Dublin Review were true because they had previously appeared in some other publication. Such evidence is far too vague to be received. The fallacy of the learned counsel's argument consists in the prosecutor's alleged submission to the previous libel. The utmost that can be said is that he did not prosecute the parties. That might have arisen from various considerations. He might not be able to fix on a particular person, or upon any one of character, or he might be prevented from proceeding by his poverty, or by a variety of other circumstances. Besides, it is not always considered expedient to institute proceedings in respect to the first charge." Nor is it any justification that prior to the publication complained against, there was a rumor or report current and generally believed that the plaintiff was guilty of the offense imputed. (Hampton *v.* Wilson, 4 Dev. 468; Haskins *v.* Lumsden, 10 Wis. 359; Moberly *v.* Preston, 8 Mis. R. 462; Cude *v.* Redditt, 15 La. An. 492; Dane v. Kenney, 5 Foster, N. H. 318; Lewis *v.* Niles, 1 Root, 346; Knight *v.* Foster, 39 N. H. 576; Woolcott *v.* Hall, 6 Mass. 514; Alderman *v.* French, 1 Pick. 1; Watkin *v.* Hall, Law Rep. III, Q. B. 396); or that the defendant spoke the words as merely giving the report. (Wheeler *v.* Shields, 2 Scam. 348; Smalley *v.* Anderson, 4 Monr. 367.) Perhaps a defendant may give in evidence under the general issue the existence of rumors against the plaintiff's character, to show that he has sustained no injury, or mitigation. (Waithman *v.* Weaver, 1 D. & R. 10; Treat *v.* Browning, 4 Conn. 408; Nelson *v.* Evans, 1 Dev. 9; Calloway *v.* Middleton, 2 A. K. Marsh. 372; Binns *v.* Stokes, 27 Mis. (5 Cush.) 239.) Neither particular reports, nor public reputation of the slander, nor of kindred charges against the plaintiff, are admissible. (Inman *v.* Foster, 8 Wend. 602; Kennedy *v.* Gifford, 19 Wend. 296; Mapes *v.* Weeks, 4 Wend. 659; Watson *v.* Buck, 5 Cow. 499.) See § 216.

[1] 12 Rep. 132; Moore, 821.

ing the Earl of Northampton. The defendants all appeared in court; Goodrich confessed to the publication, but alleged in justification that he was not the first author, and vouched said Cox, who, in like manner, confessed and vouched said Varner, who in like manner confessed and vouched said Minor, who in like manner confessed and vouched said Lake, who in like manner confessed and said he heard the words from one Spoket, who said he heard them from said Ingram, who in like manner confessed and said he heard the words from two English fugitives at Leghorn. The court intimated that *the defense of the language being a repetition would be available in the case of a common person*, but not in the case of a peer, and all the defendants were punished by fine and imprisonment. The error so far gained ground that subsequently[1] we find it held that a plaintiff in an action for slander, where the slander appeared to be a repetition, was required in his declaration to negative that the defendant had in fact heard spoken the language he was charged with publishing. Passing over a long interval we find, A. D. 1796, Lord Kenyon, then Chief Justice of the King's Bench, referring approvingly to the Earl of Northampton's case, but he introduced this qualification that to render the repetition justifiable, the defendant must at the time of the repetition, mention the name of the previous publisher, and that to name the previous publisher for the first time in the defendant's plea[2] was not a justification. This qualification was repeated in a subsequent case, A. D. 1805.[3] This other qualification was also introduced, that if the first publisher *retracted* what he had published; one who subsequently and with a knowledge of such retraction repeated the matter, was not legally excused by

[1] Crawford *v.* Middleton, 1 Lev. 82.

[2] Davis *v.* Lewis, 7 T. R. 17; and see Church *v.* Bridgman, 6 Missouri, 190.

[3] Woolnoth *v.* Meadows, 5 East, 463.

naming the prior publisher.[1] It long continued to be conceded as law that no action could be maintained for the repetition orally of defamatory matter, if at the time of the repetition the name of the previous publisher was mentioned; thus, in A. D. 1829, in an action for slander, the plea that the language was a repetition of words previously spoken by A., and that A. was named as the author at the time of the publication, was overruled, not because naming the author was no defense, but because the plea did not allege that A. spoke the words maliciously, nor that the defendant believed them to be true, nor that they were spoken on a justifiable occasion.[2] In Connecticut, it seems, that giving the name of the author was never allowed as a defense, but the fact was received in mitigation;[3] subsequently it was held not receivable in that State, even in mitigation.[4] In Pennsylvania, giving the name of the previous publisher was held to rebut the inference of malice,[5] and to amount to a mitigating circumstance.[6] In Maine, and some other States, it has been held that in an action for slander, giving the name of the previous publisher of the words is a justification of the repetition.[7] Thus far we have had reference only to

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[1] Maitland *v.* Goldney, 2 East, 426.

[2] McPhearson *v.* Daniels, 10 B. & C. 263; and see Moberly *v.* Preston, 8 Missouri, 462. In Lewis *v.* Walter, 4 B. & Ald. 605, it was said there must be a just reason for the repetition. In Hawkes *v.* Coster, 1 Law Reporter, 192 (London, 1821), Abbott, Ch. J., nonsuited the plaintiff in an action for slander, "for the defendant only—repeated the words of another, and gave his name at the time."

[3] Leister *v.* Smith, 2 Root, 24.

[4] Austin *v.* Hanchett, 2 Root, 148; Treat *v.* Browning, 4 Conn. 408.

[5] Binns *v.* McCorcle, 2 P. A. Brown's R. 79; Hersh *v.* Ringwalt, 3 Yeates, 508.

[6] Kennedy *v.* Gregory, 1 Binney, 85; Morris *v.* Duane, 1 Binney, 90, *n.* In New Jersey, naming the previous publisher was received in mitigation. (Cook *v.* Barkley, 1 Pennington's N. J. Rep. 169, A. D. 1807.) In Jarnigan *v.* Fleming, 43 Missi. 711, it is said that naming the previous publisher is not a defense, *unless it is made with a good* motive. This is equivalent to saying—that naming the previous publisher is not a defense.

[7] Unless it be proven that the repetition was malicious. (Haynes *v.* Leland, 29 Maine, 233; Abrams *v.* Smith, 8 Blackf. 95; Jones *v.* Chapman, 5 Blackf. 88; Crane

actions for slander; the first case in which the question appears to have been raised in an action for libel, was in the Supreme Court of Pennsylvania, A. D. 1803.[1] It was there held that giving the name of the author was no excuse for the publication of a libel. The like ruling was made A. D. 1813, in the Supreme Court of New York.[2] The first mention of the point arising in an action for libel in the English courts was in A. D. 1817, when it was held not to be a defense that the defamatory matter was communicated to the defendant by a third person.[3] In a subsequent case for publishing an alleged libel, purporting to be an account of a trial, the plea was that the alleged libel had been previously published in the H. Journal, and that G. H. M. then and still was the publisher thereof; on demurrer the plea was held bad, as the defendant in his repetition had only named the journal from which the alleged libel was copied, and had not given the name of the publisher, and it was intimated by the court that the defense of the publication being a repetition, and

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v. Douglass, 2 Blackf. 85; Cummerford *v.* McAvoy, 15 Ill. 311; Johnston *v.* Lance, 7 Iredell, 448.) Disclosing name of author at time of repetition held a defense. (Kelly *v.* Dillon, 5 Ind. (Porter), 426; Trabue *v.* Mayo, 3 Dana, 138; Robinson *v.* Harvey, 5 Monr. 519; Parker *v.* McQueen, 8 B. Monr. 16.) Giving name of author is evidence of want of malice. (Miller *v.* Kerr, 2 M'Cord, 285; Church *v.* Bridgeman, 6 Miss. 190; and see Easterwood *v.* Quinn, 2 Brevard, 64; Smith *v.* Stewart, 5 Barr. 372; Sexton *v.* Todd, Wright (Ohio), 317; Haine *v.* Welling, 7 Ham. 253; Farr *v.* Roscoe, 9 Mich. 353.) The defense of giving name of author must be specially pleaded. (Brooks *v.* Bryan, Wright, 760.) In slander, evidence that the defendant had been told by a third person that the plaintiff was guilty of the crime imputed to him is inadmissible. (Mapes *v.* Weeks, 4 Wend. 659; Austin *v.* Hanchett, 2 Root, 148.) In slander, it is no justification that defendant *after* speaking the words and before the commencement of the action, disclosed to plaintiff the author of the words. (Skinner *v.* Grant, 12 Verm. 456.) In Scott *v.* Peebles, 2 Sme. & M. 546, it was held to be no defense to an action for slander that the defendant heard the matter from a person out of the jurisdiction of the court. See *Evidence in Mitigation*, and Gilman *v.* Lowell, 1 Amer. Lead. Cas. 202, *n.*; 2 Greenl. Ev. § 424, *n.*

[1] Runkle *v.* Meyers, 3 Yeates, 518.

[2] Dole *v.* Lyon, 10 Johns. 447. In Tennessee the plea of repeating the words of another is no defense to a *libel* under any circumstances. (Larkins *v.* Tarter, 3 Sneed, 681.) Otherwise in slander. (*Id.*)

[3] Miles *v.* Spencer, 1 Holt, N. P. 533.

that the previous publisher was named at the time of the repetition, did not apply to libel.[1] The first case in which the dictum in the Earl of Northampton's case appears to have been altogether repudiated, was one before Judge Betts in New York, A. D. 1825.[2] It may now be considered as settled in New York and in England, that neither in the action for slander nor for libel is it any legal excuse that the alleged defamatory matter had been previously published by another, whose name was mentioned at the time of the repetition.[3]

§ 211. It is now universally conceded that to show the truth of the matter published is a complete defense to an action either of slander or libel. A publication of the truth is, as to a civil action, absolutely privileged.[4]

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[1] Lewis *v.* Walter, 4 B. & Ald. 605, A. D. 1821.

[2] Chevalier *v.* Brush, Anthon's Law Student, 186; this was followed by Mapes *v.* Weeks, 4 Wend. 659; Inman *v.* Foster, 8 Wend. 602; Hotchkiss *v.* Oliphant, 2 Hill, 510; and see Johnston *v.* Laud, 7 Iredell, 448; Dole *v.* Lyon, 10 Johns. 447; Clarkson *v.* McCarty, 5 Blackf. 574; Moberly *v.* Preston, 8 Mis. 462; Romayne *v.* Duane, 3 Wash. C. C. 246; The State *v.* Butman, 15 La. An. 166.

[3] McGregor *v.* Thwaites, 3 B. & C. 24; 4 D. & R. 695; De Crespigny *v.* Wellesly, 5 Bing. 392; Bennett *v.* Bennett, 6 C. & P. 588; Fidman *v.* Ainslie, 10 Exch. 63; nor does it make a defense that the defendant believed the matter published to be true (*id.*; Saus *v.* Joerris, 14 Wis. 663); or that plaintiff himself had previously published the same matter. (Cook *v.* Ward, 6 Bing. 409; Abshire *v.* Cline, 3 Ind. 115.)

[4] Truth is a good defense in an action for libel or slander. (*Ante*, notes 2, 3, p. 116; and see Stat. 6 and 7 Vict., ch. 96; Perry *v.* Mann, 1 Rhode Island, 263; Root *v.* King, 7 Cow. 613, and 4 Wend. 113; 1 Stark. on Sland. 229; Lake *v.* Hutton, Hob. 253; l'Anson *v.* Stuart, 1 T. R. 748); but it must be pleaded and cannot be given in evidence under the general issue, either in bar or in mitigation. (Underwood *v.* Parkes, Str. 1200; Manning *v.* Clement, 7 Bing. 367; 2 Greenl. Ev. § 424; Andrews *v.* Van Deuser, 11 Johns. 38; Van Ankin *v.* Westfall, 14 Johns. 233; Shephard *v.* Merrill, 13 Johns. 475; Snyder *v.* Andrews, 6 Barb. 43; Wagner *v.* Holbrunner, 7 Gill, 296; Smith *v.* Smith, 8 Ired. 29; Kelly *v.* Dillon, 5 Porter (Ind.), 426; Arrington *v.* Jones, 9 Port. 139; Douge *v.* Pearce, 13 Ala. 127; Kay *v.* Fredrigal, 3 Barr, 221; Thompson *v.* Bowers, 1 Doug. 321; Taylor *v.* Robinson, 29 Maine (16 Shep.), 323; Teagle *v.* Deboy, 8 Blackf. 134; Wagstaff *v.* Ashton, 1 Harring. 503; Bodwell *v.* Swan, 3 Pick. 376; Alderman *v.* French, 1 Pick. 1; Updegrove *v.* Zimmerman, 13 Penns. 619; Scott *v.* McKinnish, 15 Ala. 662; Eagan *v.* Gantt, 1 McMullan, 468; Rumsey *v.* Webb, 1 Car. & M. 104; Else *v.* Evans, Anthon N. P. 23; Burns *v.* Webb, 1 Tyler, 17; Samuel *v.* Bond, Litt. Sel. Cas. 158; Treat *v.* Browning, 4 Conn. 408; Bisbey *v.* Shaw, 12 N. Y. 67; Sheahan *v.* Collins, 20 Ill. 325; Haws *v.* Stanford, 4

The cases, of rare occurrence, of actions for writing defamatory words upon documents of the plaintiff, whereby the document is rendered less valuable, or entirely valueless, to the owner, are not exceptions to this rule. Such actions are, in fact, not actions for libel, but actions for malicious injury to property, in such actions the truth of the defamatory matter does not amount to a defense;

Sneed, 520; and see Sidgreaves *v.* Myatt, 22 Ala. 617.) The defendant may prove in mitigation such facts as show a ground of suspicion not amounting to actual proof of the charge (Wagner *v.* Holbrunner, 7 Gill, 296), or which tends to a proof of the truth, yet falls short of it (Snyder *v.* Andrews, 6 Barb. 43; Bisbey *v.* Shaw, 12 N. Y. 67; Scott *v.* McKinnish, 15 Ala. 662), or which rebut the presumption of malice. (Kennedy *v.* Dear, 6 Porter, 90; Arrington *v.* Jones, 9 Porter, 139; Hart *v.* Reed, 1 B. Monr. 166; Chapman *v.* Calder, 14 Penns. (2 Harris), 365; Abshire *v.* Cline, 3 Ind. 115; and see Moseley *v.* Moss, 6 Gratt. 534.) Evidence of general bad character may be admitted under the general issue. (Smith *v.* Smith, 8 Ired. 29; Taylor *v.* Richardson, 29 Maine, 323.) An action of slander for charging a man with having the venereal disease, and, with that disease upon him, contracting marriage, and communicating that disease to his wife, cannot be maintained, if the plaintiff immediately after his marriage had the disease in fact, even by proof that his wife, whom he married without knowing that she had the disease, communicated it to him. (Golderman *v.* Stearns, 7 Gray, 181.) In slander for calling plaintiff a whore, the words were laid to have been spoken in 1842; plea, that plaintiff, while unmarried, in 1834, had carnal connection with one A. Replication, that plaintiff, at the time mentioned in the plea, was betrothed to said A.; that afterwards she was lawfully married to him; that she lived with him a virtuous life until August, 1836, when he died; and that she had ever since continued to live in innocent and virtuous widowhood. Held, on general demurrer, that the replication was insufficient. (Alcorn *v.* Hooker, 7 Blackf. 58.) Where the charge is of a crime of which the plaintiff was convicted, it is no answer to a plea of the truth of the charge, that the plaintiff was pardoned. (Baum *v.* Clause, 5 Hill, 196; see *ante*, § 158.)

The provision of the Constitution of the State of New York, as to the defense of truth in prosecutions for libel, does not apply to civil actions. (Dolloway *v.* Turrill, 26 Wend. 383.) See further under heads *Pleading, Evidence.*

It is said that where a crime is charged, and the defense of truth is sustained, the plaintiff may be put upon his trial for the offense without the intervention of a grand jury. (Cook *v.* Field, 3 Esp. R. 133.) Many instances have occurred where the plaintiff's action for slander imputing the commission of a crime, have occasioned the prosecution and conviction of the plaintiff for the imputed offense. See Pigot's Case, Cro. Car. 383; and note *t*, 1 Stark. Slan. 237; Symms *v.* Blake, 2 C. M. & R. 416; 4 Dowl. P. C. 263; 1 Gale, 182.

Wm. Parks, the first printer in Williamsburg, Virginia, published (A. D. 1736) of a member of the House of Assembly, that he had been convicted of sheep-stealing; Parks being arraigned before the House, stated the charge to be true, and that being found the fact, he was discharged. See Thomas' History of Printing in America.

thus where a coach proprietor wrote upon the license of his driver "Discharged for being one shilling short," or where a police commissioner wrote on "a certificate" of a police officer "Dismissed the police force," pleas of the truth of these statements were overruled.[1] We do not pretend to vindicate, either as just in its practical operation or sound in principle, the rule which makes truth a complete defense to an action for slander or libel. Neither the justice nor expedience of this rule is universally nor even very generally conceded.[2] The maxim, that a man shall not profit by his own wrong,[3] ordinarily adduced as an apology for

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[1] Rogers *v.* Macnamara, 14 Com. B. 27; Hurrell *v.* Ellis, 2 Com. B. 295; Taylor *v.* Rowan, 7 Car. & P. 70.

[2] "I am quite clear that the truth ought not to be made decisive (as a defense) either in civil or criminal proceedings; for cases may be put where the truth instead of being a justification, would not even be any mitigation; nay, where it would be an aggravation. (Lord Brougham, Evidence, Rep. of Ho. of Lords on Libel, &c., July, 1843); and see in the same report the opinions of other lawyers and judges to the like effect; and see 2 Kent's Com. 25; Borthwick on Libel, 252; 29 Parl. Hist. 575; Preliminary Discourse to Starkie on Slander, xliv.

[3] Blackstone gives as a reason the merit of the defendant in having exposed the truth. (3 Black. Com. ch. viii.) This is combated by Starkie, who contends for the ground that the plaintiff cannot take advantage of his own wrong. (1 Starkie on Slander, 230, 232); and see Preliminary Discourse to Starkie on Slander.

If the words be true they are no slander, and may be justified. (2 Wils. 301; 11 Mod. 99.) If the defendant * * prove the words to be true, no action will lie, * * for then it is no slander or *false tale*. (3 Black. Com. ch. viii.) The defendant is justified in law and exempt from all civil responsibility, if that which he publishes be true. (1 Starkie on Slander, 229.)

In Rex *v.* Roberts (Ms. 8 Geo. 11, A. D. 1735, L'd Hardwicke, Ch. J., remarks): "It is said that if an action was brought, the fact, if true, might be justified, but I think that is a mistake, such a thing was never thought of in the case of Harman *v.* Delany (1 Str. 898). I never heard such a justification in an action for a libel even hinted at; the law is too careful in discountenancing such practices; all the favor that I know truth affords in such a case is, that it may be shown in mitigation of damages." It is added in a note by the editor of the American edition of Starkie on Slander (vol. I, p. 233), "In the time of Lord Harkwicke, it was denied, not only by him but by others, that the truth could be given in evidence in bar of a recovery;" and in a subsequent note (vol. I, p. 235), until 1792, when the judges of England gave their opinion in Parliament upon questions put to them on the Libel Bill, the only authorities for the position that a defendant might plead the truth of a libel in justification, were the dicta of Hobart, C. J., in Lake *v.* Hutton, Hob. R. 253, and of Holt. C. J., in an anonymous case, 11 Mod. 99; and the acquiescence of the bar and the court in I'Anson *v.* Stuart, 1 T. R. 748. Since then are the cases of King *v.* Parsons,

the rule under consideration, if it applies in any case, certainly has no application where the truth consists in the misfortune and not in the wrong-doing of the person whom the publication concerns. The rule allowing truth as a defense in a civil action for slander or libel appears to be an innovation, and of comparatively modern introduction.[1] Probably its origin was in this wise: Until the statute of the fourth year of Queen Anne, A. D. 1706, only a single plea was permitted in a civil action, and there is no record prior to that statute of a plea of truth in an action for slander or libel. At least until A. D. 1702, truth was admitted in mitigation under the general issue of not guilty,[2] but between that date and A. D. 1716, probably after the statute of Anne allowing several pleas, at a meeting of the judges of England, the rule was settled not to allow the truth to be given in evidence in mitigation, but requiring "that it should be pleaded."[3] From this we infer that no such plea existed prior to that time, and the requiring the truth to be specially pleaded was evidently to prevent a surprise upon the plaintiff, and to enable him to be prepared with his reply. Notwithstanding this rule requiring truth to be specially pleaded, we find that at least until A. D. 1735, truth was regarded only as a matter of mitigation. The system of pleading then in vogue knew no such thing as a plea in mitigation;

A. D. 1799, in which L'd Kenyon observed that it was competent for a defendant in an action for libel to plead the truth in justification, and Plunket *v.* Cobbett, A. D. 1804, in which Lord Ellenborough remarked, "in case the libel had been true the defendant could have justified it on the record." Another reason assigned for making truth a defense is, that truth disentitles to damages. (Blackburn, J., Campbell *v.* Spottiswoode, 8 Law Times Rep. N. S. 201; 3 Best & S. 769; Fairman *v.* Ives, 5 B. & Ald. 646.)

[1] Selwyn's N. P. 986; Borthwick on Libel, 246. Truth, it is said, was at all times a defense in an action for *slander*. (1 Stark. on Slander, 234; 3 Blac. Com. ch. viii.) This, however, seems doubtful. See Smith *v.* Richardson, Willes, 20; Bull. N. P. 7. Where it is said, "When evidence of the truth of the words was offered in *mitigation* of damages, Lord Macclesfield, with a great deal of indignation, refused to admit it."

[2] Underwood *v.* Parks, 2 Strange, 1200.

[3] Smithies *v.* Harrison, 1 L'd Raym. 727.

in that system every plea was either in abatement or in bar, and when truth was required to be pleaded it was almost of course to regard it as a plea in bar, and thus, as we suppose, the truth, when specially pleaded, became a defense. The truth, however, which is admitted as a defense is the truth of the defamatory matter in substance and in fact, and in the sense in which it was used and was intended to be understood. If A. says of X. that he is a thief, and C. publishes that A. said X. was a thief, in a certain sense C. would publish the truth, but not in the sense which would constitute a defense; C.'s publication would in fact be but a repetition of A.'s words, which, as we have seen, would not be a defense. (§ 210.) The truth, which in such a case would amount to a defense, would be that X. was a thief.[1] Again, if A., speaking ironically, says of X. that he is an honest man, meaning and conveying the idea that X. is a dishonest man, it would not be a justification of these words to allege that it was true X. was an honest man, but to constitute a defense the allegation required would be that it was true X. was a dishonest man. We shall give, in the following sections, some illustrations of the requirements of a justification on the ground of truth, and the subject will be further illustrated under the head of Pleading. (§ 355.)

§ 212. Where defamatory allegations, whether published orally or in writing, are divisible (§ 145), but not otherwise, the defendant is permitted to justify on the ground of truth, one or some of them, less than the whole.[2] But whether he justify the whole or a part only,

[1] Watkin *v.* Hall, Law Rep. III; Q. B. 396.

[2] See *ante*, notes, to § 145, and Stiles *v.* Nokes, 7 East, 493; Andrews *v.* Thornton, 8 Bing. 431; 1 M. & Sc. 670; Gregory *v.* Duke of Brunswick, 6 Sc. N. R. 809; Vessey *v.* Pike, 3 C. & P. 512; Van Derveer *v.* Sutphin, 5 Ohio, N. S. 293; O'Connell *v.* Mansfield, 9 Ir. Law R. 179; Smith *v.* Parker, 13 M. & W. 459; Fero *v.* Ruscoe, 4 N. Y. 162. A declaration for a libel commencing "horse-stealer," and followed by a statement of facts, and concluding that the defendant published it with intent to cause it to be believed that the plaintiff had been guilty of feloniously stealing a

the justification as to so much as is intended to be justified must go the whole length of the charge in all its material allegations. The justification must always be as broad as the charge, and of the very charge attempted to be justified.[1] A charge that the plaintiff, a brewer, *caused* his establishment to be supplied with unwholesome water, is not proved to be true by showing that the establishment *was* supplied with unwholesome water. To establish the truth of the charge, it must be shown the plaintiff *caused* the supply.[2] To a charge against the plaintiff, a schoolmaster, that the decay of the school under his management was attributable to his violent conduct, it was held, on special demurrer to the plea, not a sufficient justification to allege that the plaintiff had been guilty of violent conduct toward some of his scholars; to have amounted to a justification, it should have been shown that the decay of the school was occasioned by the violent conduct of the plaintiff.[3] A charge that plaintiff

horse; plea except as to the word horse-stealer, a justification, stating circumstances inducing suspicion that the plaintiff had been guilty of the fact; held on demurrer, that the plea was insufficient. (Mountney *v.* Watton, 2 B & Ad. 673.)

[1] Weaver *v.* Lloyd, 2 B. & C. 678; 4 D. & R. 230; Bissell *v.* Cornell, 24 Wend. 354; Stillwell *v.* Barter, 19 Wend. 478; Fidler *v.* Delavan, 20 Wend. 57; Torrey *v.* Field, 10 Verm. 353; Crump *v.* Adney, 1 Cr. & M. 362; Burford *v.* Wible, 32 Penns. 95; Wilson *v.* Beighler, 4 Iowa, 427; Van Derveer *v.* Sutphin. 5 Ohio, N. S. 293; Morrow *v.* McGaver, 1 Ir. C. L. 569; Powers *v.* Skinner, 1 Wend. 451; Cooper *v.* Barber, 24 Wend. 105; McKinly *v.* Rob, 20 Johns. 351. The plea must justify the same words as those contained in the declaration. (Skinner *v.* Grant, 12 Verm. 466; Gregory *v.* Atkins, 42 Verm. 237; Ormsby *v.* Douglass, 2 Abb. Pr. R. 407; 37 N. Y. 377.) "There is no such thing as a half-way justification. When several distinct things are charged (§ 145, *ante*), the defendant may justify as to one, though he may not be able to do so as to all; but as to any one charge the justification will either be everything or nothing. If the charge be of stealing a horse, it is not half a defense, nor any part of one, to show the plaintiff took the horse by a mere trespass." (Fero *v.* Ruscoe, 4 N. Y. 165.) A charge that plaintiff is a "libellous journalist," is not sustained by proof of his conviction of libel on one occasion. (Wakley *v.* Cooke, 4 Exch. 511.)

[2] Fidler *v.* Delavan, 20 Wend. 57. A charge that plaintiff was a "*cheat*" and "swindler" was held justified by the fact that he sold goods for the purpose of preventing their seizure under an attachment for the benefit of his creditors. (Odiorne *v.* Bacon, 6 Cush. 185.)

[3] Smith *v.* Parker, 13 M. & W. 459. To a declaration for a libel, charging that,

had stolen defendant's shingles is not justified by the fact that plaintiff sold defendant's shingles without his authority, and afterward denied that he knew anything respecting them; to constitute a justification of such a charge, a felonious taking must be shown.[1] And where the charge was that plaintiff had begotten a bastard

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by hypocritical cant, &c., plaintiff and his associates effected the incorporation of the Manhattan Bank, in which plaintiff's share of the profits was several thousand dollars; and that plaintiff, as a member of the senate, advocated the bill entitled "An Act for supplying the city of New York with pure and wholesome water," knowing that it contained a clause authorizing the company to carry on banking business, and when he knew that the other members of the legislature were ignorant of that fact, &c., the defendant pleaded in justification, that the plaintiff was a senator on second April, 1798; that such a law was passed, and that, at the time of passing said law (first April, 1798), plaintiff, as senator, advocated the bill, knowing at the time that it contained such clause, &c.; and that a large majority of the members of the legislature were ignorant of that fact, &c.; and that, at the time and place first above mentioned, plaintiff held, and was owner of a large portion of the stock created by the said law, to wit, five thousand dollars; all which acts of the plaintiff were hypocritical and deceptive, and contrary to his duty as a senator, &c. The plaintiff replied, that at the time he advocated the said law as a senator, he did not hold, and was not owner of any stock created by it; nor had he any interest whatever in the stock, &c. On a general demurrer to the reply the plea was held to be bad, as not being an answer to the declaration, and that the defendant having committed the first fault in pleading, the plaintiff was entitled to judgment. (Spencer *v.* Southwick, 11 Johns. 573; rev'g 10 Johns. 259, where the replication was held to be bad.) Held that a charge of incest could not be justified by alleging that plaintiff told the defendant her brother had had sexual intercourse with her. (Abshire *v.* Cline, 3 Ind. 115; and see Long *v.* Brougher, 5 Watts, 437, and in note 3, p. 327, *ante*.) It is not every act of illicit intercourse on the part of a female that will justify calling her a whore. (Smith *v.* Wyman, 4 Shep. 13.) The defendant, in a case of slander, admitted in his answer that, while he was conducting his own cause before a justice, and examining the plaintiff as a witness, he interrogated him: "Do you say I put you on Williams' land?" that the witness answered, "I do," and that the defendant replied, "That's a lie." The answer further alleged that plaintiff's answer to defendant's question, and his statement that the defendant put witness on Williams' land, were untrue. Held, that the answer was not good as a justification of a charge of perjury. (Lewis *v.* Black, 27 Miss. 425.) A charge that plaintiff's ship was unseaworthy and had been bought by Jews to take out convicts, is not justified by showing the ship was unseaworthy. (Ingram *v.* Lawson, 5 Bing. N. C. 66.) The justification should be of the *meaning*, not of the words merely. (Snow *v.* Witcher, 9 Ired. 346; Fidler *v.* Delavan, 20 Wend. 57.) The charge must be directly met, and not argumentatively or by inference. (*Id.*) Where the charge was that the plaintiff had *bolted*, it is not a justification to say he *quitted*. (O'Brien *v.* Bryant, 16 M. & W. 168; 4 D. & L. 341; 16 Law Jour. Rep. 77, Ex.; and see Wachter *v.* Quenzer, 29 N. Y. 547; Ede *v.* Scott, 7 Ir. L. R. N. S. 607; Watkin *v.* Hall, Law Rep. III Q. B. 396.)

[1] Shepherd *v.* Merrill, 13 Johns. 475.

child, innuendo that he had committed adultery with the child's mother, it was held that to allege an adulterous intercourse with the mother of the bastard was not stating a sufficient justification.[1] So a charge of selling intoxicating liquor contrary to law, is not justified by showing a sale of intoxicating liquor. The charge that the sale was contrary to law is not answered.[2] Nor is a charge that the plaintiff had one night gone nine miles from home to four different colliers' shanties, and that she had gone to bed to the colliers, justified by showing that plaintiff had committed fornication with one collier elsewhere than at the shanties referred to in the charge.[3] A charge of criminal intercourse with A. cannot be justified by showing a criminal intercourse with B.[4] A charge that "he is a lying, slanderous rascal," is not justified by showing that plaintiff had stated what was untrue, unless it be also shown that he did it maliciously.[5] To justify a charge that plaintiff will steal anything he can get hold of: "He is in the habit of picking up things. He stole wool of L.," various acts of theft must be shown.[6] So a charge of committing one offense is not justified by showing the commission of another offense, although of the same, or even greater enormity.[7] A charge of stealing

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[1] Holton *v.* Muzzy, 30 Verm. 365.

[2] Holton *v.* Muzzy, 30 Verm. 365.

[3] Burford *v.* Wible, 32 Penn. St. R. 95; and see Ricke *v.* Stanley, 6 Blackf. 169; *semble*, a defendant cannot justify a charge that the plaintiff had criminal intercourse with a certain woman at a certain place, by pleading that he had such intercourse with her at another place. (Sharp *v.* Stephenson, 12 Ired. 348.)

[4] Walters *v.* Smoot, 11 Ired. 315; and see Pallet *v.* Sargent, 36 N. H. 496; Randall *v.* Holsenbake, 3 Hill, So. Car. 175; Ridley *v.* Perry, 4 Shepl. 21. In case for words importing adultery with Jane at stile, defendant may give in evidence in mitigation of damages that plaintiff commited adultery with Jane at stile, but not evidence of adultery with any other. (Smithies *v.* Harrison, 1 Ld. Raym. 727.)

[6] Snowdon *v.* Linds, 1 Cr. C. C. 569.

[6] Talmadge *v.* Baker, 22 Wis. 624.

[7] Stow *v.* Converse, 4 Conn. 17; Torrey *v.* Field, 10 Verm. 353; Andrews *v.* Van Deuzer, 11 Johns. 38. Charging plaintiff with being a whore is not justified by the fact that she is a "reputed thief." (Smith *v.* Buckecker, 4 Rawle, 295.) It is no

one kind of chattel cannot be justified by showing theft of another kind of chattel. A charge that plaintiff stole "a pot and waiter" is not justified by the fact that he stole a waistcoat pattern.[1] A charge of stealing a dollar from A. cannot be justified by proof of stealing a dollar from B.[2] To prove a forgery to the amount of $80 is not a justification of a charge of forgery to the amount of $250, or any other sum.[3] A charge of the crime against nature with a *mare*, is not justified by showing a commission of that crime with a *cow*.[4] A charge that A., a commissioner to examine witnesses, returned the examination of *divers* witnesses that were never sworn, is not justified by proof of a return of the examination of *one* witness who had not been sworn.[5] Nor is a charge that the plaintiff carried on smuggling as a business justified by proof of a single act of smuggling.[6] So a charge of smuggling *during* the war is not justified by showing a smuggling *before* the war.[7] And where the charge was that plaintiff was a bankrupt in April, in the twelfth year of James the First, it was held not to be a justification to show that plaintiff was a bankrupt in the fifteenth year of James the First.[8] It is not a justification of several charges to prove the

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justification of a charge of horse-stealing and counterfeiting that plaintiff was thought no more of than a horse-thief. (Nelson *v.* Musgrave, 10 Mis. 648.) A charge of hardness toward the poor, dissoluteness of morals, &c., purporting to be conclusions from instances of bad conduct previously narrated in the publication, cannot be justified by proof of other instances. (Bartholemy *v.* The People, 2 Hill, 248.)

[1] Eastland *v.* Caldwell, 2 Bibb, 21; Hilsden *v.* Mercer, Cro. Jac. 676. A charge of perjury on one occasion cannot be justified by showing that plaintiff committed perjury on some other occasion, or in some other respect, than that alleged. (Whittaker *v.* Carter, 4 Ired. 461; Starr *v.* Harrington, 1 Smith (Ind.) 360; 1 Cart. 515; Randall *v.* Holsenbake, 3 Hill, So. Car. 175.)

[2] Self *v.* Gardner, 15 Mis. 480.

[3] Stiles *v.* Comstock, 9 How. Pra. R. 44.

[4] Andrews *v.* Van Deuzer, 11 Johns. 38.

[5] Fish *v.* Thorowgood, Cro. Eliz. 623.

[6] Stillwell *v.* Barter, 19 Wend. 487.

[7] Stillwell *v.* Barter, 19 Wend. 487.

[8] Upsheer *v.* Betts, Cro. Jac. 578.

truth of one of them.[1] A charge in these words: "thou hast played the thief with me, and hast stolen my cloth and a half yard of velvet," is not justified by showing that plaintiff was defendant's tailor, and that he, defendant, delivered to plaintiff a yard and a half of velvet to make defendant hose, and plaintiff made them too narrow, by reason of which defendant said, "Thou hast stolen part of the velvet which I delivered to you."[2] A charge against an attorney, "You are a paltry lawyer, and used to play on both hands," is not justified by showing that plaintiff had exhibited articles of the peace against R., and had afterwards promised R. that he should not be molested on account of those articles, and that notwithstanding he had endeavored to prosecute R. upon those articles.[3] A charge that plaintiff, an attorney, had been struck off the rolls is not justified by showing that he was suspended for two years.[4] A charge that plaintiff, a public minister, had traitorously betrayed the secrets of his own government, is not justified by the fact that the plaintiff disclosed the instructions given to him as such minister, although coupled with the additional fact that he was censured by his government for making such disclosures.[5] A charge that plaintiff, a counsellor-at-law, had offered himself as witness in order to divulge the secrets of his client, is not justified by the fact that in a private conversation out of court the plaintiff disclosed a secret of his client, nor by the fact that plaintiff offered himself as a witness to divulge matters communicated to him by his client, but which were not privileged publications in the sense of publications he was privileged from disclosing (§ 208).[6] A charge that plaintiff, a clergyman, had asserted

[1] Powers *v.* Skinner, 1 Wend. 451.

[2] Johns *v.* Gittens, Cro. Eliz. 239; and see Bellingham *v.* Myners, Cro. Eliz. 153.

[3] Rich *v.* Holt, Cro. Jac. 267.

[4] Blake *v.* Stevens, 4 Fost. & F. 432.

[5] Genet *v.* Mitchell, 7 Johns. 120.

[6] Riggs *v.* Denniston, 3 Johns. Cas. 198.

that the blood of Christ had nothing to do with our salvation, more than the blood of a hog, is not justified by the fact that plaintiff had denied the divinity of Christ and the doctrine of the atonement; and asserted that Christ was a creature, a perfect man, but there was no more virtue in his blood than that of any creature.[1] So a charge, "But this is not the first time the idea of falsehood and M. B. (plaintiff) have been associated together in the minds of many honest men," is not justified by the fact that more than seven persons believed plaintiff not to be a man of truth, but addicted to falsehood.[2] Charging the plaintiff, a proctor, with having been suspended *three* times, is not justified by the fact that he had been *once* suspended.[3] Where the charge is of a crime committed under aggravating circumstances, the aggravating circumstances must be justified; it is not sufficient to justify as to the commission of the crime. Thus where the alleged libel charged that the plaintiff had been tried for murder in a duel, and that "he had spent nearly the whole of the night preceding the duel in practicing pistol firing," held that to constitute a justification it must be shown not only that the plaintiff had been tried for murder, but that he spent nearly the whole of the night preceding the duel in practicing pistol firing.[4] The charge against the plaintiff was *inter alia* "he has robbed me *to a serious amount*." The pleas were the general issue, and as to the words "he has robbed me," the plaintiff had robbed defendant of a loaf of bread of the value of three pence. On the trial the plaintiff proved the charge, and the defendant proved

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[1] Skinner *v.* Grant, 12 Verm. 456.

[2] Brooks *v.* Bemiss, 8 Johns. 455.

[3] Clarkson *v.* Lawson, 6 Bing. 206, 587; 4 M. & P. 356, 605; and see Goodburne *v.* Bowman, 9 Bing. 532; 3 M. & Sc. 69; Biddulph *v.* Chamberlayne, 17 Q. B. 351; Skinner ads. Powers, 1 Wend. 451. A charge of stealing "hogs" is not justified by the fact that plaintiff stole one hog. (Swan *v.* Rary, 3 Blackf. 298.)

[4] Helsham *v.* Blackwood, 11 C. B. 111; 20 Law Jour. Rep. N. S. 187, C. P., and see Churchill *v.* Hunt, 2 B. & Ald. 685.

the stealing by plaintiff of the loaf of bread. The judge directed the jury to give some damages for the words *to a serious amount*, which were not covered by the plea. The jury gave the plaintiff forty shillings damages, and the court above refused to disturb the verdict.[1] The charge that plaintiff had been imprisoned on a *charge* of high treason, is not justified by the fact that plaintiff was arrested on suspicion of high treason.[2] And a charge that the plaintiff, a commissioner in bankruptcy, had been guilty of *wilful* misconduct in his office, is not justified by showing misconduct consistent with rectitude of intention.[3] Where the publication was in "the blacklist," with ruled columns showing entry of judgments, held not to be justified merely by showing such a judgment once existed. The language and mode of publication imputed the *continuance* of a judgment.[4]

§ 213. A justification on the ground of truth need not go further than the charge,[5] and it is sufficient to justify so much of the defamatory matter as is actionable,[6] or so much as constitutes the sting of the charge; it is unnecessary to repeat and justify every word of the alleged defamatory matter;[7] it is sufficient if the substance of the libellous charge be justified.[8] Thus, where the alleged

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[1] 1 Starkie on Slander, 484.

[2] Cooke on Defam. 116.

[3] Riggs *v.* Denniston, 3 Johns. Cas. 198.

[4] McNally *v.* Oldham, 16 Ir. Com. Law, 298; 8 Law Times, N. S. 604.

[5] Sanford *v.* Gaddis, 13 Ill. 329.

[6] Clarke *v.* Taylor, 4 Bing. N. C. 654; and see Wilson *v.* Nations, 5 Yerg. 211. Where the plea justifying a libel gave no answer to particular scurrilous terms used in it; held that, not containing any ground of imputation against the plaintiff distinct from that which was the gist of the libel, and the truth of which was justified by the plea, the plea was sufficient, and a rule to enter judgment *non obstante veredicto* refused. (Morrison *v.* Harmer, 3 Bing. N. C. 758; 5 Sc. 410.)

[7] Edwards *v.* Bell, 1 Bing. 403; Moore *v.* Terrell, 1 N. & M. 559; Cooper *v.* Lawson, 1 Per. & D. 15; Clark *v.* Taylor, 2 Bing. N. C. 654; Morrison *v.* Harmer, 3 Bing. N. C. 759; 5 Scott, 410; Barrows *v.* Carpenter, 1 Cliff. 204; Cook *v.* Tribune Asso., 5 Bl. C. C. 352. See § 358, *post.*

[8] 1 Stark. on Slan. 483.

libel was that a serious misunderstanding had taken place amongst the Independent Dissenters of M. and their pastor, the plaintiff, in consequence of some "*personal invective*" from the pulpit by the latter, and that the matter was to be taken up seriously, held, that a plea alleging that the plaintiff had spoken from the pulpit of a young lady, naming her, that her conduct was a bad example, and a disgrace to the school, and that she did more harm than good, was a sufficient justification; that such expressions clearly constituted "*personal invective.*"[1] Where the charge was that the plaintiff had been guilty of fornication, it was held sufficient as a justification to allege that the plaintiff was a strumpet, as being a strumpet included the offense of fornication.[2] And where the charge was that in consequence of the plaintiff being in bad repute in the county of O., he would not like to bring his action for libel in that county, held, sufficient as a justification to allege that the plaintiff had the reputation in the county of O. of "a proud, captious, censorious, arbitrary, dogmatical, malicious, illiberal, revengeful, and litigious man, and therefore was in bad repute, and would not like to bring his suit there."[3] And to a charge that a plaintiff signed defendant's name to a note without his (defendant's) permission, it was held sufficient as a justification to allege that plaintiff did sign defendant's name to a note without his (defendant's) permission.[4] Where the declaration alleged that plaintiff was cashier to Q., and that

[1] Edwards *v.* Bell, 1 Bing. 403. In an action of slander by a single woman, under the act of 1808, Rev. Sts. of North Carolina, ch. 110, where the words charged were "that she had lost a little one," "A. B. is a credit to her," the said A. B. being notoriously an incontinent person, and "she better be listening to the report about herself losing a little one," it was held, that it was sufficient to plead that plaintiff was an incontinent woman. (Snow *v.* Witcher, 9 Ired. 346.) But the justification should extend to every part of the defamatory matter which could by itself form a substantive ground of action. (Cooper *v.* Lawson, 8 Adol. & Ell. 751.)

[2] Clark *v.* Munsell, 6 Metc. 373, *ante* in note 1 p. 244.

[3] Cooper *v.* Greely, 1 Denio, 347.

[4] Creebnan *v.* Morley, 7 Blackf. 281.

defendant, in a letter addressed to Q., falsely wrote and published of plaintiff the words, "I conceive there is nothing too base for him to be guilty of." A plea in justification, that plaintiff signed and delivered to defendant an I. O. U., and afterwards, on having sight thereof, falsely and fraudulently asserted that the signature was not his; and that the alleged libel was written and published solely in reference to this transaction, was, on demurrer, held a sufficient justification, as the alleged libel must be understood with reference to the subject-matter.[1] The defendant, a railway company, published a notice that plaintiff had been convicted of an offense against its by-laws, and fined a certain sum, with the alternative of *three* weeks' imprisonment in case of non-payment; in fact, the alternative was *two* weeks' imprisonment; held, that it was a question for the jury whether the statement was substantially true.[2] So where the charge was that the plaintiff had been convicted and sentenced to a fine or *imprisonment with hard labor*, a plea that plaintiff had been convicted and sentenced to a fine or *imprisonment*, held a sufficient justification.[3]

§ 214. To justify a charge of perjury on the ground of truth, it must not only be alleged that the plaintiff's testimony was false, but that it was wilful or corrupt.[4] It would

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[1] Tighe *v.* Cooper, 21 Jur. 716; 7 Ell. & Bl. 639. In this case, Crompton, J., said: "I recollect being satisfied, early in my professional life, that I could justify calling a man 'a rugged Russian bear,' by showing that his manners were rough." The plea must justify according to the sense given by the plaintiff. (Fidler *v.* Delavan, 20 Wend. 57.) If the justification does not cover the whole defamation, the plaintiff is entitled to damages for the part not justified. (Cooban *v.* Holt, cited 2 Stark. Ev. 643, note 2.)

[2] Alexander *v.* N. E. R'way Co., 11 Jur. N. S. 619.

[3] Gwynn *v.* So. E'ern R'way, 18 Law Times, N. S. 738.

[4] Mitchell *v.* Borden, 8 Wend. 570; Clark *v.* Dibble, 16 Wend. 601; Gage *v.* Robinson, 12 Ohio, 250; Bissell *v.* Cornell, 24 Wend. 354; Gorton *v.* Keeler, 51 Barb. 475.

be no justification of such a charge to allege that the false testimony was given by mistake.[1]

§ 215. A justification on the ground of truth must justify in the sense imputed by the innuendo.[2] For the reason that the plea admits the innuendo.[3] Thus, where the plaintiff, an apothecary, was charged with administering medicine to a child, with an innuendo that he had feloniously killed the child, a plea that the plaintiff did injudiciously, indiscreetly and improperly, and contrary to his duty, administer medicine to the child, and that the death of the child was caused or accelerated by the said medicine, was held bad on demurrer, as confessing without justifying the innuendo.[4] But where the language is actionable independently of the meaning imputed by the innuendo, there the innuendo need not be justified, as where the charge was that plaintiff was tried at petty sessions for traveling on a railway without first paying his fare, and convicted in a penalty and costs, and there was an innuendo that the plaintiff had attempted to defraud the company; a plea that plaintiff was so convicted, without attempting to justify the innuendo, was held sufficient. The whole gist of the charge was justified.[5]

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[1] Fero *v.* Ruscoe, 4 N. Y. 162; Torrey *v.* Field, 10 Verm. 353; The State *v.* Burnham, 9 N. Hamp. 34; Jenkins *v.* Cockerham, 1 Ired. 309. It is not a justification of a charge of false swearing that the defendant had good reason for publishing the words, and made the publication from good motives and justifiable ends. (Thompson *v.* Bowers, 1 Doug. 321.)

[2] Mitchell *v.* Borden, 8 Wend. 570; Clarke *v.* Dibble, 16 Wend. 601; Gage *v.* Robinson, 12 Ohio, 250; Clarke *v.* Taylor, 2 Bing. N. C. 654.

[3] Fidler *v.* Delavan, 20 Wend. 57.

[4] Edsall *v.* Russell, 2 Dowl. N. S. 641; 5 Sc. N. S. 801. Where an intent is charged, it must be justified. (Gage *v.* Robinson, 12 Ohio, 250; Riggs *v.* Denniston, 3 Johns. Cas. 198.) "If the defendant justify specially it will not be necessary for him in his plea to deny the innuendoes and epithets contained in the declaration, for if the fact be justified (Astley *v.* Younge, 2 Burr. 807), the motive, intention, and manner are immaterial" as regards the plea. (1 Stark. on Sland. 476); and see next note, *infra*.

[5] Biggs *v.* G't East. R'way, 18 Law Times, N. S. 482.

§ 216. Although the truth of the defamatory matter is admitted as a defense, a mere *belief in the truth* of the matter published, however honestly that belief may be entertained, will not of itself constitute any defense.[1] Belief or disbelief in the truth of the matter published can be material only upon an inquiry into the intent with which a publication is made (§ 90).

§ 217. Legislative proceedings are privileged. It is obviously necessary to the efficient discharge of the duties of a legislator, that in the performance of those duties he should be allowed unlimited license of speech, and be unfettered with any apprehension of being made responsible for the consequences of any utterances he may deem it fit-

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[1] However honestly the party who publishes a libel believes it to be true, if it is untrue in fact, the law implies malice, unless the occasion justifies the act; and whether the occasion justifies the act, is a question of law. (Darby *v.* Ouseley, 1 Hurl. & N. 1; Holt *v.* Parsons, 23 Texas, 9.) A *bona fide* belief in the truth of the alleged libel is no defense. (Campbell *v.* Spottiswoode, 3 Best & Smith, 769; 8 Law Times Rep. N. S. 201; and see Moore *v.* Stevenson, 27 Conn. 14; Woodruff *v.* Richardson, 20 Conn. 238; Fry *v.* Bennett, 3 Bosw. 200; Smart *v.* Blanchard, 42 N. Hamp. 137; Kerr *v.* Force, 3 Cr. C. C. 8; Watson *v.* Moore, 2 Cush. 133; Hotchkiss *v.* Porter, 30 Conn. 314; Gilmer *v.* Ewbank, 13 Ill. 271; Duncan *v.* Brown, 15 B. Monr. 186; Grimes *v.* Coyle, 6 B. Monr. 301.) But belief in the truth may be shown in mitigation (Huson *v.* Dale, 19 Mich. 35; approving Farr *v.* Rusco, 9 Mich. 353; and overruling Thompson *v.* Bowers, 1 Douglas, 321.) Defendant cannot show that it was generally admitted for many years that the plaintiff was guilty of the crime charged. (Long *v.* Brougher, 5 Watts, 439); or that plaintiff was reported by her own sister to be guilty of the offense imputed. (Smith *v.* Buckecker, 4 Rawle, 295.) No suspicion, however strong, will amount to a justification. (Powell *v.* Plunkett, Cro. Car. 52; Moyer *v.* Pine, 4 Mich. 409.) Common fame is no ground for justifying an extra judicial charge. (Hutt. 13; Bridg. 62; Brownlow, 2.) A defendant cannot justify a charge of theft by showing that he has just grounds for believing the plaintiff to be a very dishonest man. (Woodruff *v.* Richardson, 20 Conn. 238.) The publication in a newspaper of rumors is not justified, but may be mitigated, by the fact that such rumors existed. (Skinner *ads.* Powers, 1 Wend. 451, § 411, *post.*) In mitigation of damages, in an action for a libel, the defendant was allowed, under the general issue, to show that he copied the statement from another newspaper; but was not allowed to show that it appeared concurrently in several other newspapers. (Saunders *v.* Mills, 6 Bing. 213; 3 M. & P. 520.) In an action for a libel in the defendant's newspaper, held that he could not show that it was copied from another paper, against the proprietor of which damages had been recovered, but he might show that he had omitted many of its parts reflecting on the plaintiff. (Creevy *v.* Carr, 7 C. & P. 64.) See *ante*, note 3, p. 322.

ting and necessary to make in his official capacity; accordingly we find it everywhere wisely provided that for what a legislator says as a legislator, and within the legislative chamber, he can never be challenged in any tribunal other than the body of which he is a member. This immunity, enjoyed by the members of the British Parliament in virtue of custom and statutes, is guaranteed to members of Congress by the Federal Constitution, and to members of the State legislatures by State constitutions and statutes.[1] The proceedings of the English Parliament are *in theory* conducted with closed doors, and although in fact reporters and others are usually present during the debates, yet persons so present are supposed to be concealed, and the fact of their presence to be unknown to the House. All persons not members are liable to be expelled on a member or the clerk of the House rising and stating, "Mr. Speaker, there are strangers present." This intimation is always made prior to a division, and all persons not members, nor officers of the House, without exception, retire. It is a part of the same theory which forbids the publication, unless by order of the House, of any of its proceedings, and which makes any publication of its proceedings without such order a criminal contempt.[2] Congress has

[1] 2 Hume's Hist. of England, 280; Statutes, 4 Hen. VIII; 1 W. & M. st. 2, ch. 2. Members of the House of Lords, as such, cannot be guilty of a conspiracy to libel. (*Ex-parte* Wason, Law Rep. IV, Q. B. 573.) The constitution of New York (Const. of 1846, Art. III, § 12) enacts, "For any speech or debate in either house of the legislature, the members shall not be questioned in any other place." This provision is repeated in exactly the same words. (1 Rev. Stat. of New York, 154, § 11.)

A member of the legislature is not liable to an action of slander for words spoken in the discharge of his official duties, even though spoken maliciously. (Coffin *v.* Coffin, 4 Mass. 1, 31. But see Commonwealth *v.* Blanding, 3 Pick. 310, 314.) But this privilege is not extended to words spoken unofficially, though in the legislative hall, and while the legislature is in session. (Coffin *v.* Coffin, 4 Mass. 1.) Thus where one member informally communicated to another, within the representatives' hall, and while the house was in session, that the statement which he had just made to the house upon some question lately under consideration, and likely again to be acted upon, was founded upon misrepresentation, and that his informant was a person not to be believed, using some slanderous expression in regard to the informant, it was held, that the slander was not privileged by the place or occasion. (*Ib.*)

[2] When Sir Bartholomew Shower published his collection of decisions in the House

never asserted, at least as directly as the British Parliament, the right to sit with closed doors, or to control the publication of its proceedings. The twelfth rule of the House of Representatives provides for clearing the galleries in cases of disorderly conduct, and the fourteenth rule provides for the admission, by the Speaker, of stenographers wishing to take down the debates.[1] The immunity accorded to speech in legislative assemblies extends to any record such assemblies may make of their proceedings, and to all documents read in such assemblies; it extends also to all petitions or addresses presented to the legislature, and to such a prior publication of any such documents as may be necessary to their preparation and completeness.[2]

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of Lords, still cited as "Shower's Parliamentary Cases," the publication was voted to be a breach of privilege, and the House of Lords resolved: "That it is a breach of privilege of this house for any person whatsoever to print or publish in print, anything relating to the proceedings of this house, without the leave of this house." Lord Hardwicke, in 1762, threatened to put this resolution in force against Sir Michael Foster, for introducing, without leave, into his treatise on Common Law, some decisions of the House of Lords. So, too, it was a standing order of the House of Lords, until rescinded on the motion of Lord Campbell, to enable him with safety to publish his Lives of the Lord Chancellors, "that no one presume to publish the lives of any lords, spiritual or temporal, deceased, without the permission of their heirs or executors." (VI Camp. Lives Chanc. 221.)

[1] The constitution of the State of New York of 1777, § 15, enacted that: The doors both of the Senate and Assembly shall at all times be kept open to all persons, except when the welfare of the State shall require their debates to be kept secret. * * This provision was repeated in the constitution of 1823, Art. 1, § 4, but not in the constitution of 1846. The Revised Statutes of New York (1 R. S. 153, § 4) provide: The doors of each house are to be kept open, except when the public welfare shall require secresy. The Constitution of the United States, Art. I, § 5, subd. 3, provides: That each house (of the legislature) shall keep a journal of its proceedings, and, from time to time, publish the same, excepting such parts as may in their judgment require secresy. The constitutions of New York of 1777, § 35, and of 1823, Art. I, § 4, required both branches of the State legislature to keep a journal of their proceedings, and to publish the same; and the Revised Statutes of New York (1 R. S. 153, § 3) enact: Each house is required to keep a journal of its proceedings, and to publish the same, except such part as may, in its judgment, require secresy.

[2] Where a petition to Parliament, containing defamatory matter, was referred to a committee, held that no action would lie for printing and distributing a number of copies for the use of the members. (Lake *v.* King, 1 Mod. 58; 1 W. Saund. 131 *b.*) See *post*, note 2 p. 351. The English House of Commons resolved that it was a breach of the privilege of that house to sue at law for a libel, supposed to be contained in a petition to that body. See 1 Salk. 19; 3 Salk. 17; Holt, 524.

§ 218. The immunity which is accorded to a legislator while in the performance of his duties, does not extend so far as to justify his repeating, not in his official capacity, any defamatory matter he may have written or spoken while in the discharge of his duties; and therefore for any repetition by a legislator outside of the legislative chamber of what he may have spoken within it, he is liable in like manner as any other individual.[1]

§ 219. The English Parliament, as does Congress and our State legislatures, print for the use of their members reports of their proceedings in the bodies of their Houses and in their committees, and these are privileged. The English Parliament also print additional copies for sale to the public. These additional copies are printed by the printer to the Parliament Houses, at the public expense, and sold by such printer, the proceeds of the sales being returned to the public treasury. The publication, in this manner, of additional copies of reports to the House of Commons was held by the Court of Queen's Bench not to be privileged, and where such a report so printed and sold contained defamatory matter, the printer and pub-

[1] The defendant, in a speech in the House of Lords, accused the prosecutor (an attorney) of improper conduct in his profession. This speech the defendant afterwards printed in several newspapers. For this publication an information was filed against the defendant, and he was convicted, the publication being held not to be privileged. Lord Kenyon said "That a member of Parliament had certainly a right to publish his speech, but that speech should not be made a vehicle of slander against any individual; if it was, it was a libel." (Rex *v.* Lord Abinger, 1 Esp. 226; Peake Cas. 310.) In Rex *v.* Creevy, 1 Mau. & S. 278, the defendant, a member of the House of Commons, had made a speech in his place in Parliament containing a charge against an individual. An incorrect report of this speech having been published, the defendant procured the publication of a correct version of his speech; this publication was held not to be privileged. Semble, a *bona fide* publication by a member of the House of Commons to his constituents, of a speech delivered by him in his place in Parliament, is privileged. (Davison *v.* Duncan, 7 Ell. & Bl. 229; 3 L'd Campbell's Lives of the Chief Justices, 167.) Horne Tooke applied for a criminal information against a bookseller for publishing a copy of a report made by a committee of the House of Commons. The rule was discharged, partly because the report did not appear to bear the meaning imputed to it, and partly because the court doubted its right to interfere. (Rex *v.* Wright, 8 Term Rep. 293.)

lisher were held to be liable therefor in an action for libel.[1] In consequence of that decision a statute was passed legalizing the publication *by the orders of the Parliament Houses* of such reports, papers, votes, or proceedings, as either house should deem necessary.[2] In the State of New York, the publication in a newspaper of legislative proceedings and debates is, by statute, conditionally privileged.[3] Until quite recently, it was generally supposed that the publication of defamatory matter in a report of the proceedings in Parliament was not justifiable on the ground of its being a fair report, but from the decision in Wason *v.* Walter, it seems that such a publication is justified by the fairness of the report.[4]

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[1] In Stockdale *v.* Hansard, 9 Adol. & El. 1; 2 M. & Rob. 9; 3 Per. & D. 330; 7 Car. & P. 731, it was held to be no defense, in an action for libel, that the defamatory matter was contained in a report of parliamentary proceedings and was published by order of the House of Commons. As to this case see May's Law and Practice in Parliament, 156, and Report to the House of Commons of a Select Committee on the Publication of Printed Papers, May, 1837, with an Appendix of the orders and proceedings of the two Houses of Parliament relating to the publication of Parliamentary Reports and papers and review of the legal authorities upon the jurisdiction of Parliament on matters of privilege.

[2] 3 and 4 Vict. ch. 9. Defendant may, under the general issue, prove an order to publish, and the absence of malice, which entitles him to a verdict.

[3] Laws of New York, 1854, ch. 130. See *post*, Freedom of the Press, § 252, and note to § 229.

[4] Lord Campbell: "I think it should be declared and enacted that a fair and faithful report of proceedings in either House of Parliament, from which strangers are not excluded, is justifiable, and cannot be made the subject of any action or prosecution." Lord Denman: "I cannot help entertaining a strong opinion that no faithful report of a debate ought to expose the publisher to an action or to a criminal proceeding. As the law now stands, the fact of the report being a faithful one is nothing like a justification, but it ought to be." (Report from Committee of House of Lords on the Law of Defamation and Libel, July, 1843.)

In the case of Wason *v.* Walter, reported in the London Times of 19th, 20th, and 21st December, 1867. The plaintiff, a member of the bar, sent a petition to Earl Russell for presentation to the House of Lords, praying an inquiry into a complaint he alleged against the Lord Chief Baron of the Court of Exchequer. In the debate on the presentation of this petition, the friends of the Lord Chief Baron cast imputations upon the plaintiff. A report of this debate, and a leading article in reference thereto, appeared in the London Times, of which the defendant was the proprietor. For the publication of this report and leading article the action was brought. The defenses were, that the report was a true report, and that the leading article was a

§ 220. Defamatory matter published in or to a court of criminal jurisdiction may constitute the wrong called "*malicious prosecution*,"[1] but never, it would seem, the wrong called slander or libel. Thus, where a defendant went before a justice of the peace, and demanded a warrant against the plaintiff for stealing his ropes, the justice said, "Be advised, and look what you do," and the defendant replied, "I will charge him with flat felony, for stealing my ropes from my shop;" in an action of slander for speaking these words, the court agreed that the words being spoken to a justice of the peace, on an application for a warrant which was lawful, would not support an

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just and fair comment upon the proceedings in the debate. It was admitted that the matter was defamatory in its character, and the only questions were, (1) Was it a defense to say the matter was a correct report of a proceeding in Parliament? and (2) Was it the subject of criticism? The Lord Chief Justice charged the jury: The report being faithful and correct, "I am prepared to direct you, in point of law, that the report is a privileged communication, and one which is not the subject-matter of an action." And after stating that the question was then for the first time directly presented for adjudication, and that some dicta supported his ruling, he added: "The cases have not hitherto gone the length of establishing the law I am now laying down, but I find nothing which to my mind satisfactorily contradicts the position I adopt." And again: "There may be dicta which may possibly have a different tendency, but, I think, with the larger and more enlightened views relative to the law of libel which have gradually developed themselves in our day, the time has come when the proposition I have put, ought to be affirmatively announced." As to the second point, the charge was: "I am of opinion that the debate in the House of Lords upon the plaintiff's petition was a matter of public interest and concern upon which a public writer was perfectly justified in making such comments as the circumstances warranted." The plaintiff tendered a bill of exceptions to this charge. The jury gave a verdict for the defendant. A motion for a new trial was denied. (Law Rep. IV, Q. B. 73.) The Lord Chief Justice has shown by his charges in all the cases of libel tried before him, that he favors the greatest latitude of newspaper criticism. For his views on the right of criticism, reference may be had, in addition to the above case, to the case of Dr. Hunter *v.* The Publisher of the Pall Mall Gazette, printed in pamphlet form, and in the Pall Mall Gazette of Nov. 27, 28, 29, 30, Dec. 1, 3, 1866. Same case Hunter *v.* Sharp, 15 Law Times, N. S. 421; 4 Fost. & F. 983.

[1] It is "malicious prosecution," and not what we term "slander or libel," which corresponds to "calumny" in the civil law. In the Roman law, calumny signified an unjust prosecution or defense of a suit, and a calumniator was one who unjustly accused others in a court of law. See Domat's Civil Law, B'k III, tit. 5, § 2, div. 14, note, edit. by Strahan. Calumny is still employed in this sense in the courts of Scotland, and in the ecclesiastical and admiralty courts of England. See Dunlap's Adm. Pra. 291, and *post*, note to § 221.

action, for if they would, no other would come to a justice of the peace to inform him of a felony.[1] Every one having reasonable and probable grounds for suspecting that a crime has been committed, has the right to communicate his suspicions to the magistrate having jurisdiction of criminal offenses.[2] The existence of reasonable and probable ground for the suspicion is absolutely necessary to create this right; a communication made without these grounds is inexcusable, and is a malicious prosecution, for which, however, no remedy can be had in an action for slander or libel. This results from the rules of pleading and the classification of actions into several different *forms* (§ 53) or *causes of action*, and operates even in those States where it has been expressly enacted that all forms of action are abolished.[3]

§ 221. The right of appealing to the civil tribunals is more extensive than the right of appealing to the criminal tribunals; for, as to the former, every one has the right, with or without reasonable cause for so doing, to prefer his complaint to them;[4] and whatever he may allege in

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[1] Ram *v.* Lamley, Hutt. 113. An action of slander does not lie for a charge of a criminal offense made to a magistrate upon which a warrant issues, although the accused be discharged after examination. (Schock *v.* McChesney, 2 P. A. Browne's R. 6, App; Cohen *v.* Morgan, 6 D. & R. 8; 2 Stark. Sland. 72, note *t.*) And see *post*, note to § 221.

[2] Lester *v.* Perryman, Law Rep. v, Ex. 365, reversing s. c. Law Rep. iii, Ex. 197.

[3] This result is brought about as thus: If the plaintiff shows on the face of his (declaration) complaint that the publication was made to a court of criminal jurisdiction, he does not show a cause of action unless he alleges *inter alia* that the publication was made without reasonable or probable cause. But if the (declaration) complaint does not disclose that the publication was made to a court of criminal jurisdiction, then it would be a complete defense that the publication was made to a court of criminal jurisdiction; which defense could not be avoided by replying or proving on the trial that the publication was without reasonable or probable cause, as that would be in the one case a *departure*, in the other a *varianee*. See Torrey *v.* Field, 10 Verm. 353.

[4] "No punishment was ever appointed for a suit in law, however it be false and for vexation." (6 Robinson's Prac. 897, citing numerous authorities.) But in Churchill *v.* Siggers (3 El. & Bl. 929), it is said: "One man has a right to sue another, but if one sue another with malice and without reasonable cause, it is a wrong." And see

his pleading as or in connection with his grounds of complaint can never give a right of action for slander or libel. The immunity thus enjoyed by a party complaining extends also to a party defending; whatever one may allege in his pleading by way of defense to the charge brought against him or by way of counter-charge, counter-claim, or set-off, can never give a right of action for slander or libel. The rule as thus laid down has been doubted by some, and it has been said that if the tribunal to which the complaint be made has no jurisdiction of the subject-matter, or if the defamatory matter be irrelevant to the matter in hand, or if the party complaining or defending maliciously inserts defamatory matter in his pleading, that in such cases the party aggrieved may maintain his action for slander or libel.[1] Notwithstanding the dicta to the con-

Wren *v.* Weild, Law Rep. iv, 736 Q. B.; Collins *v.* Cave, 4 H & N. 225; 6 *Id.* 131; Walker *v.* Goe, 3 H. & N. 395; 4 *Id.* 351. Inducing a pauper to bring an unfounded suit, actionable. (Pechell *v.* Watson, 8 M. & W. 691, cited 6 H. & N, 133.)

[1] "Words that might otherwise import a slander, being *necessarily* used in a judicial procedure, cannot subject the party to any censure or penalty, either in respect to parties, objections to witnesses, or challenges to jurymen, that being understood as done in vindication of one's right; but yet, if things that are injurious, quite foreign to the cause, be charged in the libel" (*i. e.*, the summons or declaration), "such pursuer shall suffer as a slanderer; for the cover of a judicial procedure cannot protect him, since the design of injuring is evident, and the more public and solemn it is, the injury is so much the more heinous." (Borthwick on Libel, 215, n.) See Rex *v.* Salisbury, 1 L'd Raym. 341. If he (a party appealing to a court of competent jurisdiction) approaches the council with other than pure views; if under the mask of vindicating his violated rights, seeking a redress for injuries, or removing a public grievance, he calumniates the man against whom he prefers his complaint, I can discover no legal or even plausible ground to shield him from answering as a libeller; and the opinion of the court from 4 Co. 14, in the case of Buckley *v.* Wood, I consider as very apposite to this case. It is dictated by sound principles of law and solid sense. (The Chancellor in Thorn *v.* Blanchard, 5 Johns. 525.) No action of slander or libel lies for defamatory matter in a pleading (Vin. Abr. Act. for Words, C, *a.* 19; Dawling *v.* Wenman, 2 Show. 446; s. c. Dawling *v.* Venman, 3 Mod. 108; Cox *v.* Smith, 1 Lev. 119; Brown *v.* Michel, Cro. Eliz. 500; Hoar *v.* Wood, 3 Metc. 193; Gosslin *v.* Cannon, 1 Harrington, 3; Briggs *v.* Byrd, 12 Ired. 377; Shelford *v.* Gooding, 2 Jones, N. Car. 175; Lea *v.* White, 4 Sneed, 111), as in a bill in equity (Forbes *v.* Johnson, 11 B. Monr. 48), or a writ or declaration (Hardin *v.* Cumstock, 2 A. K. Marsh. 480), although the charge be groundless. (Hill *v.* Miles, 9 N. Hamp. 9.) Where one addresses a complaint to persons competent to redress the grievance complained of, no action will lie against him, whether his statement be true or false, or his motives innocent or malicious. (Thorn *v.* Blanchard, 5 Johns. 508.) And it is at least doubtful whether

trary, we believe the better and the prevailing opinion to be, that for any defamatory matter contained in a *pleading*

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a want of jurisdiction in the court to which a complaint may be exhibited will make it a libel, because the mistake of the court is not imputable to the party but to his counsel. (*Id.;* Lake *v.* King, 1 W. Saund. 132; Hawk. Pl. Cr. 73, § 8; *contra,* Buckley *v.* Wood, 4 Co. 14.) That was the case of a bill in the Star Chamber; as to part of the matter the court had, and as to part had not jurisdiction; the latter being defamatory, held to be actionable. So no action lies for words spoken on giving a party in charge to a constable, or in preferring a complaint to a magistrate. (Johnson *v.* Evans, 3 Esp. 32.) But the privilege is confined strictly to communications which are necessary for obtaining redress or forwarding the ends of justice. Thus, where A. obtained a warrant to search the house of B. for goods suspected to be stolen, and in accompanying the officer to execute the warrant told the officer that B. had robbed him, held that this statement was not privileged. (Dancaster *v.* Hewson, 2 Man. & R. 176.) See Lathrop *v.* Hyde, 25 Wend. 448, where, under a similar state of circumstances, the action was held maintainable, the jury finding express malice. And where the defendant, before making any complaint to a magistrate, made a charge against the plaintiff to C., a constable, adding that he should require C. to serve the warrant on the plaintiff, held this was not a privileged communication; and where, after the plaintiff had been acquitted before the justice, the defendant repeated the charge against the plaintiff, held this was not a privileged communication. (Burlingame *v.* Burlingame, 8 Cow. 141.) Whatever may be said or written by a party to a judicial proceeding, or by his attorney, solicitor, or counsel therein, if pertinent and material to the matter in controversy, is privileged, and lays no foundation for a private or public prosecution. The protection is absolute, and no one shall be permitted to allege that it was said or written with malice. But if a party or his agent pass beyond the prescribed limit to asperse or vilify another, he is without protection, and must abide the consequences. As where a person acting as counsel in a justice's court prepared and presented a declaration, charging the defendant with a trespass, and alleging that the defendant was "reputed to be fond of sheep," "in the habit of biting sheep," and that "if guilty, he ought to be shot;" held, that an indictment therefor as a libel, alleging malice, was good. (Gilbert *v.* The People, 1 Denio, 41.) If a party institute proceedings in a court of justice as a pretense, and merely to promulgate slander, or to serve any other improper purposes, an action may be maintained for any libellous matter contained in it. (Hill *v.* Miles, 9 N. Hamp. 9.) Where words accusing the plaintiff of felony were spoken to a justice, on an application for a warrant for felony, the question whether they are actionable or not depends upon the question whether they were made in good faith or not, and that question should be left to the jury. (Bunton *v.* Worley, 4 Bibb, 38; and see Marshall *v.* Gunter, 6 Rich. 419; Briggs *v.* Byrd, 12 Ired. 377.) A letter addressed to a judge before whom a proceeding is pending, being an irregular and improper proceeding, is not privileged. (Gould *v.* Hulme, 3 C. & P. 625.) For such a letter the writer may be punished as for a contempt. (*Ex-parte* MacGill, 2 Fowl. 474; Eagleton *v.* Duchess of Kingston, 8 Ves. 467.) An affidavit made before a magistrate to enforce the law against a person accused therein of a crime, does not subject the accuser to an action for libel, though the affidavit be false and insufficient to effect its object. (Hartsock *v.* Reddick, 6 Blackf. 255.) Under statute 5 & 6 Vict. c. 109, the vestry, on precept from the justices, are to return a list of parishioners liable to serve as constables, and to give notice when and where objections will be heard by the justices, who are empowered to strike out of the list the

in a court of civil jurisdiction, no action for libel can be maintained; the power possessed by courts to strike out *scandalous* matter from the proceedings before them,[1] and to punish as for a contempt, is considered a sufficient guarantee against the abuse of this privilege;[2] but whatever may be the reason, it seems certain that where there is a perversion of the right, "the policy of the law steps in and controls the individual right of redress" by action of libel.[3]

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names of persons not liable to serve. Plaintiff's name was inserted in the list of persons liable to serve, and he attended a session to be sworn in, when the defendant, a parishioner, objected to him, and made a statement to the justices, in the presence of other persons, imputing perjury to plaintiff. In an action for slander, the jury found that defendant made the statement *bona fide*, believing it to be true. Held, that the statement was properly made before the justices, and was a privileged communication. (Kershaw *v.* Bailey, 1 Exch. 743; 17 Law Jour. R. 129, Ex.) And see 10 Law Times, 289; and *ante*, note 1, p. 348; and *post*, § 222.

[1] King *v.* Sea Ins. Co., 26 Wend. 62; Powell *v.* Kane, 5 Paige, 265, affirming 2 Edw. Ch. 450; Somers *v.* Torrey, 5 Paige, 54; Downing *v.* Marshall, 37 N. Y. 382.

[2] Henderson *v.* Broomhead, 4 Hurl. & N. 577; Astley *v.* Younge, 2 Burr. 807. The action of slander does not lie for a criminal charge made by an affidavit before a magistrate, the plaintiff's remedy being by an action for malicious prosecution or arrest, or for maliciously suing out a search-warrant. (Sanders *v.* Rollinson, 2 Strobh. 447.) No proceeding according to the regular course of justice, will make a complaint or other proceeding amount to a libel for which an action can be maintained; and a distress-warrant is a proceeding given to the party by law, for the purpose of enforcing a legal right, and comes directly within the reason of the rule. (Bailey *v.* Dean, 5 Barb. 297.) When a requisition is presented for the arrest of a fugitive from justice, with the proper vouchers, according to the act of Congress, it is the duty of the executive to cause the fugitive to be arrested and delivered to the agent appointed to receive him, and the governor has no power to entertain an application to recall or modify such warrant, and an affidavit to support such an application is not a privileged communication. (Hosmer *v.* Loveland, 19 Barb. 111.) A complaint to the grand jury, containing a charge of perjury, is privileged, although before its presentation it was exhibited to various persons, by whom it was signed. (Kidder *v.* Parkhurst, 3 Allen (Mass.), 393. See Lake *v.* King, 1 Mod. 58; Vanderzee *v.* McGregor, 12 Wend. 545; Sands *v.* Robison, 12 S. & M. 704.) In King *v.* Townsend, (12 Law Rep. 126; Appendix, *post*), which was an action for libel contained in an affidavit voluntarily made by the defendant before a magistrate—the report does not state under what circumstances—Abbott, Ch. J., said: "This action is maintainable. This affidavit is not a judicial proceeding, for it is the mere voluntary affidavit of the defendant, and if such an affidavit were to be considered as a judicial proceeding, and therefore privileged, it would afford a very easy recipe for a libeller to traduce the characters of the most innocent persons." See n. 2, p. 352, *post*.

[3] Thorn *v.* Blanchard, 5 Johns. 530.

§ 222. The protection which is accorded to *a pleading* extends to every other proceeding in a civil action,[1] and therefore for anything contained in *an affidavit* made in the course of an action or proceeding, no action for libel can be maintained. Thus, where an attorney sued his client for professional services, the client gave notice, under the general issue, that he would prove that the attorney conducted the prosecution and defense of the several suits, and attended to the other professional business in the declaration mentioned, in so careless, unskillful, and improper a manner, as to render such service of no value; the attorney moved to strike out the notice as false; the client resisted this motion upon an affidavit of his own, stating that the attorney had revealed confidential communications of the client relative to a portion of the business to a third person, to the client's prejudice. For the allegations in this affidavit the attorney brought an action of libel against the client, and in his declaration set out the facts to the effect stated above, and charged that the allegations of the affidavit were false, malicious, and impertinent, a demurrer to the declaration was sustained, and it was held that the affidavit was pertinent to the motion, and the truth or falsity could not be questioned in an action for libel.[2]

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[1] An attorney's bill of costs, although delivered under a judge's order is not a legal proceeding, and is not within the above rule. The plaintiff having obtained an order for defendant, his late attorney, to deliver a bill of costs, defendant delivered a bill headed, "Relative to your defalcations," which phrase was repeated in several parts of the bill. In an action of libel for this statement, it was claimed that the bill, having been delivered under a judge's order, was a legal proceeding, and privileged, but it was ruled otherwise, and plaintiff had a verdict. (Bruton *v.* Downes, 1 Fost. & F. 668.)

[2] Garr *v.* Selden, 4 N. Y. 91, rev'g 6 Barb. 416. In Doyle *v.* O'Doherty, 1 Carr. & M. 418, it was held that in an affidavit in answer to the application of the plaintiff for a criminal information against the defendant for sending a challenge, the defendant was justified in stating any matters, however defamatory and otherwise libellous to prevent the court making the rule absolute, and that no action could be sustained for anything contained in such an affidavit.

A., in opposing a motion for an injunction against him, contradicted a material

§ 223. The due administration of justice requires that a witness should speak, according to his belief, the truth, the whole truth, and nothing but the truth, without regard to consequences, and he is encouraged to do this by the consciousness that, except for any willfully false statement of a material fact, which is perjury, no matter that his testimony may in fact be untrue, or that loss ensues by reason of his testimony, no action of slander can be maintained against him for any statement made as a witness.[1] But the act of testifying as a witness must be either in the exercise of a right or the performance of a duty, and in either case the act must be performed in good faith (§ 40), or it will be wrongful. If, therefore, one avails himself of the occasion of his position as a witness "to maliciously answer the questions put to him," in bad faith, and with a knowledge that his answer is not pertinent or relevant, then the law withdraws the protection it would

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fact in the moving affidavit of W., and swore that W. knew its falsity, and had been guilty of perjury; *held*, that an action for libel could not be maintained by W. for the allegation in A.'s affidavit. (Warner *v.* Paine, 2 Sandf. 195; and see Suydam *v.* Moffatt, 1 Sandf. 495.) No action can be maintained for defamatory matter in an affidavit used in the course of a cause, even where the party defamed is not a party to the cause. (Henderson *v.* Broomhead, 4 Hurl. & N. 569; Revis *v.* Smith, 18 C. B. 126; Dawling *v.* Venman, 3 Mod. 109; Kennedy *v.* Hilliard, 10 Ir. L. R. N. S 195; 1 Law Times, N. S. 578.) See *ante*, note 2, p. 351.

[1] No action lies for words spoken as a witness. (Weston *v.* Dobniet, Cro. Jac. 432; Damport *v.* Sympson, Cro. Eliz. 520; Astley *v.* Younge, 2 Burr. 807; Harding *v.* Bulman, 1 Brownl. 2; Lewis *v.* Few, 5 Johns. 13.) Although the words are spoken maliciously and without reasonable or probable cause, and the plaintiff has suffered damage in consequence. (Revis *v.* Smith, 18 C. B. 126; Rex *v.* Skinner, Lofft, 55.) The witness is not bound to determine the materiality of the evidence, and he may answer, without liability for so doing, questions put to him, and not objected to or not ruled out by the court. The fact that the testimony is irrelevant, or that the witness is influenced by malice, will not render him liable to an action for slander. (Calkins *v.* Sumner, 13 Wis. 193.) In Barnes *v.* McCrate, 32 Maine (2 Red.), 442, and Perkins *v.* Mitchell, 31 Barb. 461, it is said the witness is not liable if the answers are pertinent and responsive. No action will lie against a witness for damage sustained by the falsity of his testimony (Smith *v.* Lewis, 3 Johns. 157; Grove *v.* Brandenburg, 7 Blackf. 234; Cunningham *v.* Brown, 18 Verm. 123; Dunlap *v.* Gladding, 31 Maine, 435); as where an action was brought against a witness for swearing that a jewel was worth no more than £180, whereas it was worth £500, a verdict being found for the plaintiff, judgment was arrested. (Damport *v.* Sympson, Cro. Eliz. 520; see cases collected Vin. Abr., Act. on the Case for Deceit.) No action lies for suborning a wit-

otherwise have afforded him.[1] Where the defendant, a witness, was asked if a certain person was attended by a physician, his answer was, "Not as I know of; I understood he had a quack; I would not call him a physician," on an action brought for these words, it was held proper to charge the jury that if they "believed from all the circumstances proved, from the question put, from the manner of answering, and from the answers themselves, that the defendant testified in good faith, or in the belief that his answers were pertinent or relevant, then the law protected him; but if the defendant was actuated by mere malice, and used the words for the mere purpose of defaming the plaintiff, then the law withdrew the protection it would otherwise have afforded him.[2] Where the plaintiff brought an action against one L., and the defendant being produced as a witness at the trial, testified that the plaintiff was a common liar, by reason whereof the jury gave the plaintiff but small damages. After verdict for the plaintiff, in an action for slander, it was moved in arrest of judgment that the action did not lie, for if it did, every witness might be charged upon such a suggestion, and judgment was given for the defendant.[3]

§ 224. A party to a proceeding in a court of justice is not liable to an action for any statement he may make in court in relation to the matter there pending, provided that such statement is made in good faith, believing it to be material,[4] and that it is not calculated to provoke a

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ness to testify falsely. (Smith *v.* Lewis, 3 Johns. 157; Bostwick *v.* Jervis, 2 Day, 447.) In slander for charging the plaintiff, in the presence of "sundry persons," with larceny, the defendant pleaded that he spoke the words in giving testimony as a witness in a certain cause. Held, that the defendant might, on the trial, prove what the testimony which he gave was, and that the plaintiff, if he meant to proceed for speaking the words on some other occasion than that named in the plea, should have new assigned. (Nelson *v.* Robe, 6 Blackf. 204.)

[1] Smith *v.* Howard, 28 Iowa, 51; Marsh *v.* Elsworth, 1 Sweeny, 52.

[2] White *v.* Carroll, 42 N. Y. 161.

[3] Harding *v.* Bullman, Brownlow, 2; Hutt. 11.

[4] Allen *v.* Crofoot, 2 Wend. 515. No statement in the course of "*judicial proceedings*" which a party may reasonably deem necessary to his cause, will be held libel-

breach of the peace.[1] Where the defendant having made a criminal complaint against the plaintiff, was questioned by him with regard to it during its pendency, and answered, in the presence of the magistrate, that he believed the charge true, held that if the defendant believed in good faith that it was necessary for him to answer the plaintiff, the answer was privileged.[2] So it has been held that if a servant summon his master before a court of conscience for wages, and the latter, in his necessary defense, utter words imputing a felony to the former, no action will lie.[3] Where the prosecutor in an indictment said of one offered as bail for the defendant, in the indictment, "I believe he was mixed up in the fraud," held privileged if spoken in the belief that it was true.[4] And where the plaintiff was a witness on the trial of cause in which the defendant was a party, on her testifying to a particular fact, the defendant immediately, in open court, exclaimed, "That is a lie, and I can prove it," and soon after added, "and I think I have proved it." For these words the plaintiff brought suit, and it was held no action would lie, the words being uttered "in the progress of a trial, and in the course of justice."[5] Where the plaintiff, in an action for slander, alleged that he took an oath in the

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lous, however defamatory it may in its nature be; and it makes no difference with regard to such privileged statements whether they are or not malicious, provided they may be reasonably deemed necessary to the case. (Lea *v.* White, 4 Sneed (Tenn.), 111; Vausse *v.* Lee, 1 Hill, So. Car. 197; Gosslin *v.* Cannon, 1 Harring. 3; Marshall *v.* Gunter, 6 Rich. 419; Warner *v.* Paine, 2 Sandf. 195.) "Judicial proceedings" are not confined to trial of civil actions or indictments, but includes every proceeding before a competent court or magistrate in the due course of law, or the administration of justice, which is to result in any determination or action by such court or officer. (Perkins *v.* Mitchell, 31 Barb. 471.)

[1] Reg. *v.* Hutchins, 7 Ir. L. R. N. S. 426.

[2] Allen *v.* Crofoot, 2 Wend. 515

[3] Trottman *v.* Dunn, 4 Camp. 211. "An action for libellous words spoken or sworn in a court of justice, in a man's own defense, against a charge upon him in that court, will not lie. (Astley *v.* Younge, 2 Burr. 807; 2 L'd Ken. 536.)

[4] Banbury *v.* Duckworth, 21 Law Times, 302.

[5] Badgley *v.* Hedges, 1 Pennington, 233; but see note 2, p. 357, *post*, also § 171.

King's Bench to bind the defendant to good behavior, and thereupon the defendant falsely and maliciously said, "there is not a word true in that affidavit, and I will prove it by forty witnesses." The jury found the words false and malicious, and for the plaintiff; but judgment was arrested on the ground that what defendant said was in his justification and defense in a legal and judicial way.[1]

§ 224*a*. A party to a proceeding in a court of justice may ordinarily conduct the prosecution or defense in person or by counsel or attorney,[2] where he conducts the case in person, whatever he may reasonably believe necessary successfully to maintain his suit or his defense, that he may speak, in the course of the proceeding, without being subject to an action for slander. A party who is not a barrister or counsellor conducting a cause on his own behalf or on behalf of another, has the same privilege as a counsel as to what he may say.[3] The defendant, while advocating his own cause before a referee, and while summing up the cause, called plaintiff, among other things, a perjured scoundrel; in an action for these words, a verdict was taken for the plaintiff; on motion in arrest of judgment the verdict was sustained, and judgment ordered for the plaintiff. The court said that to arrest the judgment, it must be held that counsel are protected for words spoken by them on the trial of a cause, although they may have been false, and uttered willfully and maliciously, and were irrelevant, and although neither the evi-

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[1] Bolton *v.* Clapham, W. Jones, 431; Mar. 20, cited by Holroyd, J., in Hodgson *v.* Scarlett, 1 B. & A. 244, and commented upon in Hastings *v.* Lusk, 22 Wend. 419; and see Kean *v.* McLaughlin, 2 S. & R. 470.

[2] In New York State, every person of full age and sound mind may appear by attorney * * in every action * * by or against him in any court, or may at his election prosecute or defend such action in person. (2 R. S. 276, § 11.)

[3] Ring *v.* Wheeler, 7 Cow. 725; Hastings *v.* Lusk, 22 Wend. 410; Hoar *v.* Wood, 3 Metc. 193.

dence nor the circumstances afford a suspicion to warrant the accusation. But the court thought the rule could not be carried to that extravagant length.[1] Where a party to a suit was conducting the defense in person, and while cross-examining a witness, upon the witness stating certain facts, exclaimed, "It is not so; it's not so; no such thing." In an action for slander by the witness for these words, the jury found they were intended to impute perjury, and the court held them to be actionable.[2]

§ 225. The right which a party to a proceeding in a court of justice, conducting the proceeding in person, has to speak all that he may reasonably believe to be necessary for the successful maintenance of his action or defense, is enjoyed by one conducting a proceeding for another, whether he be conducting it as counsel, attorney, or otherwise. A party was alleged to have kept a sum of money which, by his contract, he ought not to have kept; counsel, in reference to this matter, used the language, "This gentleman has defrauded us," and was interrupted by the court before he had finished his sentence. Held, first, that the words were not actionable; secondly, that they were not irrelevant to the matter before the court.[3] "A counsellor hath a privilege to enforce anything which is informed him by his client, and to give it

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[1] Ring *v.* Wheeler, 7 Cow. 725; Hastings *v.* Lusk, 22 Wend. 410.

[2] Didway *v.* Powell, 4 Ky. (Bush) 77; see § 171, and Badgley *v.* Hedges, 1 Pennington, 233.

[3] Needham *v.* Dowling, 15 Law Jour. C. P. 9. An attorney acting as an advocate is privileged as to statements made in the trial of his client's cause, in the same way as counsel. An attorney, in defending his client from a charge of assault in turning out the plaintiff from certain premises in which he had agreed to sell wine under an agreement with J., stated that J. had sufficient reasons for determining the agreement; that he had been plundered by the plaintiff to a frightful extent. Held, a privileged statement. (Mackey *v.* Ford, 5 Hurl. & Nor. 792.) A master is not liable to an action of slander for words spoken while acting as counsel for his slave, while he is on trial before a competent tribunal, provided the words are material and pertinent to the matter in question. (Shelfer *v.* Gooding, 2 Jones' Law (N. Car.), 175.) As to the privilege of counsel, see Vin. Abr., Act. for Words, B. *a.* 2.

in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false, for a counsellor is at his peril to give in evidence that which his client informs him, being pertinent to the matter in question; but matter not pertinent to the issue, or the matter in question, he need not deliver, for he is to discern in his discretion, what he is to deliver and what not, and although it be false, he is excusable, it being pertinent to the matter. But if he give in evidence anything not material to the issue which is scandalous, he ought to aver it to be true, for it shall be considered as spoken maliciously and without cause, which is a good ground for an action."[1] "If a counsellor speak scandalous words of one in defending his client's cause, an action doth not lie against him for so doing; for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions."[2] "If a man should abuse this privilege, and under pretence of pleading his cause, designedly wander from the point in question, and maliciously heap slander upon his adversary, I will not say he is not responsible in an action at law."[3] Counsel is not liable to answer for defamatory matter uttered by him in the trial of a cause, if the matter is applicable and pertinent to the subject of inquiry, but this privilege of counsel must be understood to have this limitation, that he shall not avail himself of his situation to gratify private malice by uttering slanderous expressions against party, witness, or third persons, which have no relation to the subject-matter of the inquiry,[4] and "if a counsel, in

[1] Brook *v.* Montague, Cro. Jac. 90.

[2] Wood *v.* Gunston, Sty. 462; *per* Glyn, J., in Hodgson *v.* Scarlett, 1 B. & A. 232; L'd Ellenborough said Wood *v.* Gunston carried the privilege too far.

[3] Tilghman, Ch. J., McMillan *v.* Birch, 1 Bin. 178. A proctor is not privileged in making defamatory statements not relevant to the matter in hand (Higginson *v.* Flaherty, 4 Ir. L. R. N. S. 125).

[4] Jennings *v.* Paine, 4 Wis. 358; Hoar *v.* Wood, 3 Metc. 193; Hodgson *v.* Scarlett, 1 B. & A. 232; Holt N. P. 621; Parker *v.* Mitchell, 31 Barb. 469.

the course of a cause, utter observations injurious to individuals and not relevant to the matter in issue, it seems to me that he would not, therefore, be responsible to the party injured in a common action for slander, but that it would be necessaay to sue him, in a special action on the case, in which it must be alleged and proved that the matter was spoken maliciously, and without reasonable and probable cause;"[1] and semble, that although it be lawful for a counsel in the discharge of his duty to utter matter injurious to individuals, yet the subsequent publication of such slanderous matter is not justifiable unless it be shown that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence.[2]

§ 226. The right of an accused person to say all that he may honestly consider necessary for his defense is not confined to proceedings in a court of justice; it extends to every occasion upon which one is called upon to defend himself from any charge against him. Thus, words spoken in good faith, and within the scope of his defense, by a party on trial before a church meeting, are privileged, and do not render him liable to an action, although they disparage private character.[3] Where the defendant expressed an opinion founded upon the statements of others that the plaintiff had maliciously killed his (defendant's) horse. For expressing this opinion the defendant was arraigned *before the church.* In self-defense he produced certificates of the persons upon whose authority he had spoken. For this the plaintiff sued, but offering no direct proof of malice, it was held the action was not maintainable.[4] So where R. & Co. received a written order for an

[1] Holroyd, J., Flint *v.* Pike, 6 D. & R. 528; 4 B. & C. 473.

[2] Kane *v.* Mulvany, 2 Ir. R. C. L. 402.

[3] York *v.* Pease, 2 Gray (Mass.), 282.

[4] Dunn *v.* Winters, 2 Humph. 512.

iron target, which order purported to come from the defendant; R. & Co. sent the target to the defendant, who returned it, stating that he had never ordered it, and requested to see the written order upon which R. & Co. had acted; the order was sent to the defendant, and he wrote R. & Co. that he firmly believed it was written by the plaintiff. It was submitted on behalf of the defendant that the communication was a (conditionally) privileged one. It was left to the jury to say whether the defendant had written that the plaintiff was the author of the order sent to R. & Co. *bona fide* and without malice, believing his statement to be true; the jury found in the affirmative, a verdict was entered for plaintiff with £5 damages, with leave to the defendant to move to enter the verdict for him, and on motion the verdict was entered for the defendant.[1]

§ 227. No action for slander or libel can be maintained against a judge, or one exercising judicial functions, for anything he may say or write in his judicial capacity upon the trial or upon the determination of a cause or matter pending before him; if improper, it may be a ground for his impeachment or for an application for his removal, but not for an action of slander or libel.[2] Plea to a declaration for slander, that defendant was a county court judge, and the words complained of were spoken by him in his capacity as such judge, while setting in his court and try-

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[1] Croft *v.* Stevens, 7 Hurl. & N. 570; see *post*, § 240.

[2] Rex *v.* Skinner, Lofft, 1099. Neither party, witness, counsel, jury, or judge, can be made to answer for words spoken in office; although, if they be opprobrious and irrelevant to the case, the court will notice them as a contempt, and examine on an information, and punish accordingly. (*Id.*; Henderson *v.* Broomhead, 4 Hurl. & N. 564; Kendillon *v.* Maltby, 2 Moo. & Rob. 438; Moore *v.* Ames, 3 Caines, 170.) In Entick *v.* Carrington, 19 State Trials, 1062, Lord Camden remarks, "No man ever heard of an action against a conservator of the peace as such." Quoted, South *v.* The State of Maryland, 18 How. U. S. Rep. 403, and see Vin. Abr. Act. Case Deceit, Q. *b.* 1. "If judges were liable to be sued for words spoken in their judicial capacity, it may be said, in the words of Lord Stair, 'No man but a beggar or a fool would be a judge.'" (Lord Robertson, Miller *v.* Hope, 2 Shaw App. Cas. 134.)

ing a cause in which the, now, plaintiff was defendant. Replication: That the said words were spoken falsely and maliciously, and without any reasonable, probable, or justifiable cause, and without any foundation whatever, and not *bona fide* in the discharge of defendant's duty as judge, and were wholly irrelevant in reference to the matter before him. On demurrer, held that the replication was bad and the action not maintainable.[1] Thus, no action lies against a coroner for words spoken maliciously in the course of an inquest before him.[2] For whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action, for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached

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[1] Scott *v.* Stansfield, Law Rep. III, Ex. 220. See Gelen *v.* Hall, 2 H. & N. 393; Haggart's Trustee *v.* Hope, 20 Fac. Dec. 371; Shaw App. Cas. 125; Aon *v.* McNiel, 5 Brown Sup. 573; Fray *v.* Blackburn, 3 B. & S. 576; Yates *v.* Lansing, 5 Johns. 282; 9 *id.* 395; Randall *v.* Brigham, U. S. Supreme Court Dec., 1868, 7 Wallace, 523; Dickerson *v.* Fletcher, Stuart's Canada Rep. 276; Gugy *v.* Kerr, *id.* 292; and 296 *note.*

[2] Thomas *v.* Churton, 6 Law Times, N. S. 320; 2 B. & S. 475. And *semble*, there would be no action although the words were spoken without probable cause. (*Id.*) And per Cockburn, Ch. J.: "I should not wish to lay down the broad proposition that in no case is a judge liable for words uttered by him as a judge." "A public officer, who is not a mere volunteer, but compelled to act in a judicial capacity, is not amenable, either civilly or criminally, for a mistake in law or error of judgment, when his motives are untainted with fraud or malice." (Teall *v.* Felton, 1 N. Y. 547.")

Words spoken in discharge of official duty are not actionable. (Goodenow *v.* Tappan, 1 Ham. 60.) *Aliter*, if spoken under pretence of official duty, wantonly and with malice. The question of intention is to be left with the jury. (*Ib.*) Thus, in an action against the defendant, a ward-beadle, for words spoken by him before an inquest, but not in answer to any inquiries of the jury nor in the presence of the jury only, held that it was a question for the jury whether the words were spoken by the defendant in the discharge of his official duty. (Wilson *v.* Collins, 5 C. & P. 373.) In an action for libel against one, a justice of the peace, for defamatory matter contained in an official certificate by him to the grand jury, held the publication was conditionally privileged. (Sands *v.* Robinson, 12 S. & M. 704.) A report of the grand jury, under any part of § 2992 of the Code of Iowa, held not a privileged communication; but where it was made in good faith, and in the discharge of a supposed public duty, it does not furnish ground to sustain an action for libel. (Rector *v.* Smith, 11 Iowa (3 With.), 302.) What a petit jury says in the jury room concerning a matter before the jury is absolutely privileged. (Dunham *v.* Powers, 42 Verm. 1.

or indicted, but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done.[1] No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.[2] No action will lie for defamatory matter contained in a presentment of a grand jury.[3] The plaintiff (Captain Jekyll) having preferred certain charges against Colonel Stewart, an officer in the same regiment with plaintiff, Colonel Stewart was tried by a court martial, and the president of the court, Sir John Moore, delivered to the judge advocate a written opinion, as the decision of the court, and in such opinion, after stating that the court found Colonel Stewart not guilty of the charges imputed to him, added: "The court cannot pass without observation the malicious and groundless accusations that have been produced by Captain Jekyll against an officer whose character, during a long period of service, has been irreproachable." For this addition to the decision Captain Jekyll brought an action for libel against the president of the court. The plaintiff was nonsuited, and a new trial being moved for, it was refused on the ground that the language complained of formed part of the judgment of acquittal.[4] In another case of an action brought for defamatory matter contained in a report of a

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[1] Rochester White Lead Co. *v.* The City of Rochester, 3 N. Y. 466. See Cooke on Defam. 63; 1 Bish. Cr. Law, §§ 914, 916, 3d ed.; Scovil *v.* Geddings, 7 Ohio, 211.

[2] Weaver *v.* Devendorf, 3 Denio, 117; Vail *v.* Owen, 19 Barb. 22; Brown *v.* Smith, 24 *Id.* 419; and see Hill *v.* Sellick, 21 Barb. 207; Harman *v.* Brotherson, 1 Denio, 537. But an officer who violates a ministerial duty, though his office is primarily judicial, is liable therefor. (Wilson *v.* Mayor of New York, 1 Denio, 595; Rochester White Lead Co. *v.* City of Rochester, 3 N. Y. 463.) Words spoken by the mayor of a city are privileged. (Rector *v.* Smith, 11 Iowa, 302.)

[3] Bac. Abr. tit. Libel, 445; Mo. 627; Hawk. Pl. Cr. c. 73, § 8; and see observations in Johnson *v.* Sutton, 1 T. R. 493.

[4] Jekyll *v.* Moore, 2 New R. 341; and see Kendillon *v.* Maltby, 1 Car. & M. 402; 2 Moo. & Rob. 438; Warden *v.* Bailey, 4 Taunt. 67; 4 M. & S. 400. And where, upon a proceeding on the game laws in Scotland, after the defendant had confessed, and had appealed to the leniency of the court for a mitigation of the penalty, it was asserted by the defendants, two of the justices, that "he was a thief, and had been

military court of inquiry appointed to investigate charges against the plaintiff, it was held that the report was a privileged publication, and could not be given in evidence.[1] So it was held that the defendant, being governor in council of Fort St. George, was justified in publishing, according to the fact, that the court of directors had resolved to dismiss the plaintiff from the service for a gross violation of the trust reposed in him as commanding officer of the Molucca Islands, and that he (the defendant) had been ordered to erase his name from the army list.[2]

§ 228. With regard to the right of a judicial officer, we suppose a difference exists between a judge of a court of record and a judge of a court not of record, or one who is not, indeed, a judge in the strict sense of the term, but who merely executes judicial functions; as respects the first, his being a judge, without more, constitutes a complete defense to an action for anything said or written by him as such judge (§ 227); but as respects the second, the privilege arises only in cases in which he had jurisdiction. "If magistrates while occupying the bench, under pretence of *giving advice*, publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the commission of the peace, a report of what passed before them is as little privileged as if they were illiterate mechanics in an ale-house."[3]

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known to steal bee-hives and leather;" held, on appeal, that subordinate judges were responsible for words spoken, if malice was clearly made out, the privilege being confined only to members of Parliament and judges of the supreme courts; the judgment of the court of session, as far as the interlocutor of relevancy was concerned, was therefore affirmed, but the House not being satisfied that there was evidence of malice, the cause was remitted to another jury. (Allardice *v.* Robertson, 1 Dowl. N. S. 495. See s. c. 6 Shaw. & Dun. 242; 7 *Id.* 691; 4 Wil. & Shaw App. Cas. 102; 1 Dowl. & Cl. 495.)

[1] Oliver *v.* Bentinck, 3 Taunt. 456. See Dawkins *v.* L'd Paulet, Law Rep. V, 94 Q. B.

[2] Home *v.* Bentinck, 4 Moore, 563; 8 Price, 226, and note *Id.* 244. A communication to a governor respecting an officer under his command is *quasi* judicial and privileged. (Gray *v.* Pentland, 2 S. & R. 23; 4 S. & R. 420.)

[3] Campbell, Ch. J. Lewis *v.* Levy. 1 El. B. & E. 537; 36 Law Jour. Rep. 282, Q. B; and see as to necessity of tribunal having jurisdiction, Hosmer *v.* Loveland, 19

§ 229. Independently of any statute, certainly in the State of New York, and probably in every other State, "the publication of the proceedings upon a judicial trial fairly reported and without express malice, is not actionable."[1] The like rule obtains in England, but as both there and in New York some limitations are imposed upon the rule, it is necessary, in order to show in what these limitations consist, to examine somewhat in detail the authorities upon the subject. The initial principle seems to be that the public good requires that the proceedings in courts of justice should be conducted openly. Accordingly it is in New York provided by statute that "the sittings of every court within this State shall be public, and every citizen may freely attend the same."[2] Although there is no such law in England, it is the custom there to hold the courts with open doors. And it is said to be a rule of law that "every one is supposed or presumed to be cognizant of the proceedings in the courts of justice,"[3] and hence "it is of great consequence that the public should know what takes place in the courts."[4] A publication of the proceedings of a court "only extends

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Barb. 111; Howard *v.* Thompson, 21 Wend. 319; King *v.* Root, 4 Wend. 113; O'Donaghue *v.* McGovern, 23 Wend. 26; Hastings *v.* Lusk, 22 Wend. 410; Fawcett *v.* Charles, 13 Wend. 473; Harrison *v.* Bush, 5 Ell. & Bl. 344; Milam *v.* Burnsides, 1 Brev. 295; Moloney *v.* Bartley, 3 Camp. 210; McGregor *v.* Thwaites, 3 B. & C. 24.

[1] Edsall *v.* Brooks, 17 Abb. Pra. R. 227; 26 How. Pra. R. 426. In New York the publication of judicial proceedings is protected by statute, which enacts: No reporter, editor, or proprietor of any newspaper shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings of any statement, speech, argument, or debate, in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of publication. (Laws 1854, ch. 130, § 1.) Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor, or proprietor, from an action or indictment for any libellous comments or remarks superadded to and interspersed or connected with such report. (*Id.* § 2.)

[2] 2 Rev. Stat. 274, § 1. "No law insures the publicity of the courts of justice, either in England or the United States." Lieber on Civil Liberty, 134; ed. of 1859.

[3] Willard's Eq. Juris. 251.

[4] Campbell, Ch. J., Hearne *v.* Stowell, 12 Adol. & El. 718; 4 Per. & D. 696.

that publicity which is so important a feature of the administration of the law in England, and thus enables to be witnesses of it not merely the few whom the court can hold, but the thousands who can read the report,"[1] and "we ought to make as wide as possible the right of the public to know what takes place in a court of justice."[2] It is conceded that some "inconveniences and mischief" results or may result from the publication of the proceedings in courts of justice,[3] but "the balance of public benefit from the publicity is great."[4] "Those who are present hear all (that takes place), relevant or irrelevant, and those who are absent may * * have all that is said reported to them * * When once you establish that a court is a *public* court, a fair and *bonâ fide* report of all that takes place there may be published.[5] For being a true account of what took place in a court of justice, which is open to all the world, the publication of it (cannot be) unlawful."[6] But, "it must not be taken for granted that the publication of every matter which passes in a court of justice, however truly represented, is under all circumstances and with whatever motive published, justifiable; but that doctrine must be taken with some grains of allowance."[7] For as a judicial proceeding is privileged on principles of public convenience, the privilege is limited in respect to the *subject-matter* of the report, and as to the *manner* of the reporting,[8] and the "con-

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[1] Wilde, B., Popham *v.* Pickburn, 7 Hurl. & N. 891. On its being remarked to Lord Mansfield, that few persons attended the courts merely to watch the proceedings, he replied, "No matter, we sit every day in the newspapers."

[2] Pollock, Ch. B., Ryalls *v.* Leader, Law Rep., 1 Ex. 298.

[3] Flint *v.* Pike, 4 B. & C. 473. Littledale, J.

[4] Campbell, Ch. J., Hearne *v.* Stowell, 12 Adol. & El. 718; 4 Per. & D. 696.

[5] Bramwell, B., Ryalls *v.* Leader, Law Rep., 1 Ex. 298.

[6] Eyre, Ch. J., Currie *v.* Walter, 1 B. & P. 525.

[7] Stiles *v.* Nokes, 7 East, 493.

[8] 1 Stark. Slan. 263.

dition necessarily annexed to the immunity is, that the proceeding be fairly, impartially, and correctly reported, and even in that case it will be for the court to consider whether it was lawful to publish it.[1] "Matters may appear in a court of justice that may have so immoral a tendency, or be so injurious to the character of an individual that their publication would not be tolerated."[2] And therefore it is said, "There is no privilege when the subject-matter is *blasphemous* or *defamatory of an individual*."[3] Thus where on the trial of Carlile for publishing Paine's Age of Reason, the defendant read the whole of the book to the jury, and afterwards his wife published a full report of the trial, containing an entire copy of the Age of Reason as read to the jury; for this publication a criminal information was granted against Mrs. Carlile, the court observing that although as a general proposition it was certainly lawful to publish the proceedings of courts of justice, yet it must be taken with this qualification, that what is contained in the publication must neither be *defamatory of an individual*, tending to excite disaffection, nor calculated to offend the morals of the people.[4] Although in the course of a trial it may become necessary for the purposes of justice to hear or read matter of defamatory or of immortal tendency, it is not yet competent to any persons, under the pretence of publishing that trial, to re-utter or circulate such matter. It is observed in the Sixth Report of the English Criminal Law Commissioners, that these qualifications destroy all the supposed privilege. Our explanation is this: Truth is not a defense to a criminal prosecution for libel, and therefore where a report of a trial contains blasphemous, indecent, or defamatory matter, it is not the less the subject of a

[1] Littledale, J., Flint *v.* Pike, 4 B. & C. 473; 1 Stark. Slan. 263.

[2] Maule, J., Hoare *v.* Silverlock, 9 C. B. 20.

[3] 1 Stark. Slan. 263.

[4] Rex *v.* Carlile, 3 B. & Ald. 167.

criminal prosecution because it is a fair or true report of a judicial proceeding. In a subsequent case,[1] Maule, J., said: "I think it is impossible at this day to say that a fair account of proceedings in a court of justice, *not being ex parte*, but on the hearing of both sides, is not, *generally speaking*, a justifiable publication. *I do not lay it down as a universal proposition;* but as a general rule, it may be assumed that the publication of a fair account of what passes in a court of justice, not *ex parte*, is justifiable, unless there is something to take it out of that rule." "No case has decided that a report of proceedings in a court of justice implicating the reputation of a third person is under any (all) circumstances privileged."[2] "There is no *dictum* to be met with in the books, that a man, under the pretence of publishing the proceedings of a court of justice, may discolor and garble the proceedings by his own comments and constructions, so as to effect the purpose of aspersing the character of those concerned."[3] But we ought to protect a fair and *bona fide* statement of the proceedings in a court of justice,[4] and perhaps the result of the authorities is that: a fair report of a trial or a proceeding in a court of justice, conducted publicly in the presence of the parties concerned, is conditionally privileged.[5]

§ 230. When it is said that a fair report of a trial in a court of justice is privileged, what is meant by a fair

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[1] Hoare *v.* Silverlock, 9 C. B. 20.

[2] Ryalls *v.* Leader, Law Rep., I, 298, Ex. and see Pittock *v.* O'Neill, 63 Penns. 253.

[3] Spencer, J., Thomas *v.* Crosswell, 7 Johns. 264, and see Rish Allah Bey *v.* Whitehurst, 18 Law Times, N. S. 615.

[4] Ryalls *v.* Leader, Law Rep., I, 298, Ex.

[5] A fair account of what takes place in a court of justice is privileged. Hearne *v.* Stowell, 12 Adol. & El. 718; 4 Per. & D. 696; Turner *v.* Pullman, 6 Law Times Rep. N. S. 130; Rex *v.* Wright, 3 T. R. 298; Chambers *v.* Payne, 2 C. M. & R. 156; Cincinnati, &c. Co. *v.* Timberlake, 10 Ohio, N. S. 548; Flint *v.* Pike, 4 B. & C. 84; Saunders *v.* Mills, 6 Bing. 213; 3 M. & P. 520; Lewis *v.* Levy, 1 El. B. & E. 537; Andrews *v.* Chapman, 3 C. & K. 286; Smith *v.* Scott, 2 C. & K. 580.

report? In one case it is said: "*If* a party is to be allowed to publish what passes in a court of justice, he must publish *the whole case*, and not merely state the conclusion which he himself draws from the evidence,"[1] and where in a report of proceedings under a commission of lunacy, it was stated, "The plaintiff's testimony, being unsupported, failed to have any effect upon the jury, * * Mr. Jervis commented with cutting severity on the testimony of Mr. O," the statement was held not privileged, and it was said that the proceedings themselves ought to have been set out, not merely the result of them.[2] Yet again it has been said, that an abridged report may be a "fair report,"[3] and where in an action against the publisher of a newspaper for a libel, on the plea of not guilty, it appeared that the libel purported to be the account of a trial of a former action, brought by the present plaintiff against other parties for a libel, and after

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[1] Abbott, Ch. J., Lewis *v.* Walter, 4 B. & A. 612.

[2] Roberts *v.* Brown, 10 Bing. 519; 4 M. & Sc. 407; and see Delegal *v.* Highley, 3 Bing. N. S. 950; where the matter complained against professed to be a report of proceedings in a court of justice, did not profess to state facts as deposed to by the witness, but only as stated by the counsel for the prosecution—held not to be a fair report, and not privileged. (Saunders *v.* Mills, 6 Bing. 213; 3 M. & P. 520.) And where the report stated that the evidence before the magistrate entirely negatived the story of the plaintiff, which story was the statement of the plaintiff in which the imputed perjury was contained,—Held not to be privileged; and a plea justifying this report on the ground that it was a fair and correct report of the proceedings which had taken place, was held bad after verdict. (Lewis *v.* Levy, 1 Ellis, B. & E. 537.) The editor of a newspaper has the right to publish the fact that an individual has been arrested, and upon what charge, but he has no right while the charge is in the course of investigation before the magistrate, to assume that the person accused is guilty, or to hold him out to the world as such. (Usher *v.* Severance, 2 App. 9.) See Woodgate *v.* Ridout, 4 Fost. & F. 202; Kane *v.* Mulvany, 2 Ir. Com. Law R. 402.

[3] Turner *v.* Sullivan, 6 Law Times, N. S. 130. A report *in substance* true, it seems is not privileged. (Flint *v.* Pike, 4 B. & C. 473.) A report "outrageously wrong," is not privileged. (Blake *v.* Stevens, 4 Fost. & F. 232; 11 Law Times, N. S. 543.) Where the defendant the publisher, of a treatise on the "law of attorneys," purporting to give the substance of the report of proceedings against the plaintiff, an attorney, stated that the plaintiff had been "struck off the rolls," instead of stating as the fact was that plaintiff had been suspended for two years, held it was a question for the jury, whether this was a fair representation of the report. The jury found it was not and the plaintiff had a verdict. (*Id.* see *ante*, § 213.)

stating the libel in the original action, and the facts proved by the then defendants, and the summing up of the judge, it stated that the jury found a verdict for the plaintiff, with £30 damages. No evidence was given as to any such trial having taken place in fact, or whether the report was fair or not. It was left to the jury to say whether the report, although it contained some allegation injurious to the plaintiff, was, if taken altogether, with the statement of the verdict being in his favor, injurious to the plaintiff on the face of it; and the jury having found for the defendant, the court refused a rule for a new trial.[1] The report is not privileged if it in anywise discolors or garbles the proceedings, or adds (unwarranted) comments or insinuations.[2] As where the report was headed "Shameful conduct of an attorney,"[3] or "How lawyer Bishop treats his clients,"[4] or "Extorting money to hush up a complaint,"[5] or "Blackmailing by a policeman,"[6] or "Horse-stealing,"[7] it was held not to be privileged. Where a statement defamatory of the plaintiff was copied from a previous publication, and published by the defendant, prefaced by the word "Fudge," the court left it to the jury to say whether that word was added to vindicate the character of the plaintiff, or merely to create an argument in favor of the defendant, in case proceedings should be taken against him for the publication.[8] In another case the report was headed "Wilful and corrupt perjury," and it was said by the court "That (the heading) is

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[1] Chalmers *v.* Payne, 2 C. M. & R. 156.

[2] Thomas *v.* Crosswell, 7 Johns. 264; Stiles *v.* Nokes, 7 East, 493, s. c. *sub nom;* Carr *v.* Jones, 3 J. P. Smith, 491; Flint *v.* Pike, 4 B. & C. 473.

[3] Clement *v.* Lewis, 3 Brod. & B. 297, affirming Lewis *v.* Clement, 3 B. & Ald. 702.

[4] Bishop *v.* Latimer, 4 Law Times, N. S. 775.

[5] Stanley *v.* Webb, 4 Sandf. 21.

[6] Edsall *v.* Brooks, 17 Abb. Pra. R. 221; 2 Robertson, 29.

[7] Mountney *v.* Wotton, 2 B. & Ad. 673.

[8] Hunt. *v* Algar, 6 C. & P. 245.

merely stating the charge. It may be a heading entirely innocent, simply indicating what is to follow, and it would be a question for the jury whether it is a fair and *bona fide* report of the proceedings."[1]

§ 231. While it is considered a principle of public convenience to allow or even to encourage reports of the proceedings on a trial, reports of preliminary proceedings *have been* discouraged and regarded as having "a tendency to pervert the public mind, and to disturb the course of justice."[2] In England, the magistrate has the

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[1] Lewis *v.* Levy, 1 Ell. B. & E. 537. In Barber *v.* Bennett, Ms., the report of a proceeding before a magistrate was headed "Suspicion of stealing money." The defence was a fair report, and on demurrer the Superior Court of New York held that the heading did not prevent the report being a privileged publication.

[2] L'd Ellenborough, King *v.* Fisher, 2 Camp. 563; and see Charlton *v.* Walton, 6 Car. & P. 385; also Rex *v.* Fleet, 1 B. & A. 379, where a criminal information was granted against the defendant for publishing the minutes of a coroner's inquest. It was said to be highly criminal to publish *ex-parte* accounts. Courts and judicial officers have always claimed and exercised the right to dictate whether or not the proceedings before them should be published. In the time of Edward the Third, Lucius de Thaestead, a notary public, was committed to the Tower for merely attending in court to take a note of the proceedings between Johannes de Bourne and Ricardus de Potesgrave, and in Flint *v.* Pike, 4 Barn. & C. 473, Littledale, J., said it was for the court to consider whether it was lawful to publish a report of the proceedings. Lord Eldon interdicted the publication of the proceedings on the application of the poet Shelley for the custody of his children. (See Memoir of Shelley, by T. L. Peacock, and Fraser's Magazine, No. 342, 361.) So recently as 1867, a justice of the Superior Court of the City of New York prohibited the publication of proceedings had before him, and his course was approved by the other justices of that court. A coroner may prohibit the publication of proceedings had before him (Garrett *v.* Ferrand, 6 B. & C. 611), and so may a committing magistrate. (Cox *v.* Coleridge, 1 B. & G. 37. See Borthwick on Libel, 119, 121, note; Holt on Libel, ch. ix.) The cases are more numerous where the publication of the proceedings has been prohibited pending the proceedings. A disregard of such a prohibition is a contempt. In one case, Lord Eldon remarked that when he first came into Westminster Hall, the law was well understood that it would be a contempt to publish the proceedings of the court before they were finished. (Knight *v.* Knight, 1 Jac. & Walk. 167.) In Rex *v.* Clement, 4 Barn. & Ald. 218, Lord Tenterden ordered that there should be no publication of the proceedings until the several indictments against the defendant had been tried; and he fined a newspaper proprietor £500 for disobedience to this order, in publishing an account of the first trial before the second had begun. The courts upheld the action of Lord Tenterden. Lord Campbell, in his Lives of the Chief Justices, vol. III, p. 208, gives it as his opinion that this transaction tarnished the fame of Lord Tenterden, and that the order forbidding the publication was "impru-

power of conducting preliminary examinations privately, and a report of such a proceeding would not be privileged.

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dently" made. See Rex *v.* Gilham, 1 M. & M. 165; Brook *v.* Evans, 6 Jur. N. S. 1025; Filkin *v.* Herbert, 32 Law Jour. 294, Ch. In New York, by statute (2 Rev. Stat. 278, § 10), "Publishing a false or grossly inaccurate report of the proceedings of a court of record is a criminal contempt." Any publication prejudicing the merits of a cause before it is heard is a contempt. (2 Atk. 479.) The validity of plaintiff's marriage coming in question in a suit, her father, pending the suit, advertised in a newspaper, offering a reward to any one who would produce legal proof of the marriage—held a contempt. (Pool *v.* Sacheverel, 1 P. Wms. 676.) The printers of a newspaper were committed for publishing; that certain parties to a suit had turned "affidavit men." (Roach *v.* Garvan, 2 Atk. 469; 2 Dick. 794.) In that case reference was made to the case of a printer of a newspaper punished for publishing of a certain cause, that it was "a hue and cry after charitable uses," and to the case of Capt. Perry, punished for printing and publishing his brief before the cause came on. A party was committed to prison for publishing an advertisement reflecting on an answer in the cause. (See Cann *v.* Cann, 2 Dick. 795; 2 Ves. 520; *Ex-parte* Crow, 2 Turn. & Ven. Pra. 231, 232.) Where an injunction order appointing a receiver had been granted, the party obtaining the order caused printed copies of it to be dispersed among the tenants, to prevent them paying rents except to the receiver; Lord Hardwick refused to adjudge it a contempt, but expressed his disapproval of the proceeding (Baker *v.* Hart, 2 Atk. 488), as thus: "Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced." Repeated by Sir W. Page Wood, V. C., Tichborne *v.* Mostyn, Law Rep. VII, Eq. 55, n.; and see Daw *v.* Eley, Law Rep. VII, Eq. 49, in which case the solicitor in the cause had published a letter in a newspaper relating to the pending suit; on a motion to punish said solicitor and editor for contempt, the motion was granted as to the solicitor and denied as to the editor. (See Coleman *v.* West Hartlepool R'wy Co., 8 Weekly Rep. 734; *Ex-parte* Jones, 13 Ves. 237; Littler *v.* Thompson, 2 Beav. 129; Felkin *v.* L'd Herbert, 33 Law Jour. Ch. 294; Lechmere Charlton's Case, 2 My. & Cr. 316; *Ex-parte* Smith, 21 Law Times, N. S. 294.) Publishing disparaging comments upon the court, or its officers, or its proceedings, is a contempt. Thus the New York Common Council, being enjoined by a preliminary injunction from certain official action, passed resolutions declaring the injunction illegal, proclaiming a resolution to disregard it, and imputing dishonesty to the judge who granted it; held, the resolution was a contempt. (The People *v.* Compton, 1 Duer, 512; affirmed, The People *v.* Sturtevant, 9 N. Y. 263; and see Morrison *v.* Moat, 4 Edw. 25.) And where an officer of a corporation had a verdict against him in an action for malicious prosecution, which verdict was sustained by the court, the corporation voted him a sum of money, and passed a resolution to the effect that in instituting the prosecution in question he had been actuated by motives of public justice; this was held a reflection upon the court, and a contempt. Rex *v.* Watson, 2 Term R. 199.) Pending the trial of one Nixen, in the Oyer and Terminer, New York City, April, 1864, an article appeared in the New York Tribune, headed, "A judicial outrage," and which was supposed to reflect upon the conduct of

But if a preliminary proceeding is carried on *foribus apertis*, it would be privileged. We are not prepared to lay

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the judge (G. G. Barnard) presiding on the trial of Nixon. The article was supposed to have been written by Horace Greeley, and an order issued for him to show cause before Judge Barnard why he should not be attached for contempt. Instead of showing cause, he moved for a writ of prohibition, which being denied, the following order was made:

"*In the Matter of Horace Greeley upon an Order to show cause why he should not answer for a Contempt of Court.*—It is ordered by the court, that the said Horace Greeley, now here appearing by I. T. Willams, Esq., his counsel, answer (and the answer under oath is waived) the following interrogations, and have until Monday next, being the 25th day of April inst., at 11 o'clock A. M., to file answers thereto, and be then heard in this court in defense of the accusation that he published a grossly inaccurate report of the proceedings of this court in the Daily Tribune of April 14, 1864, in the language contained in and recited in interrogatory the first.

"*Interrogatory the First.*—Did you write in manuscript the following matter, which appeared in page 4, in column 2 thereof, in the New York Daily Tribune of Thursday, April 14, 1864, to wit?

("A judicial outrage." Here follows the article, portions of which contain the alleged contempt.)

"*Interrogatory Second.*—If not, did you write in manuscript any *part* thereof?

"*Interrogatory Third.*—If not, did you see the same in manuscript or in proof before it was published?

"*Interrogatory Fourth.*—If not, were you or not the responsible editor of the Tribune on the 14th day of April, 1864?

"*Interrogatory Fifth.*—If you did not write or see before publication the said matter, do you know who is the author, or writer, or composer thereof, or did you not know that it was to be published?

"*Interrogatory Sixth.*—If you know the said author or writer, please name him.

"Then follows a statement or report of the transactions in court, which were reported and commented on in the Tribune, and a disclaimer from the court of any complaint as to the editorial comments, but only as to what purports to be a report of the proceedings in court."

To these interrogatories Mr. Greeley made and filed the following statement:

"Horace Greeley, in the above-entitled proceedings referred to, protesting against the jurisdiction of this court over his person, and over the proceedings now being taken, and insisting that they are irregular and without warrant of law, and further insisting that he ought not to be asked, and cannot legally be compelled, to answer questions upon a charge which is in its nature criminal, and for which he may be exposed to indictment, both as a misdemeanor for a contempt as well as for a libel, and further insisting that the said article, in the order to show cause in these proceedings referred to, is not a report of the proceedings of a court, but, on the other hand, is simply an editorial criticism, based upon a report of such proceedings contained in a newspaper called the Evening Express, published two days before said editorial article was published, to wit, on the 12th day of April instant.

"For answer to the interrogatories filed and served on him, says that he is now, and ever since its foundation has been, the principal editor of the newspaper called the Tribune, and is one of its proprietors, by being a stockholder of the corporation that publishes the same. That as such editor and proprietor he is subject to all the responsibilities that justly pertain to that relation. Believing that this avowal is a substantial answer to all the interrogatories propounded to him, he most respectfully declines to answer any questions that may expose any of his associates in the editorship and publication of said newspaper, to the discipline of this tribunal, preferring to abide the consequences, be they what they may."

The court being satisfied that no disrespect was intended, discharged Mr. Greeley.

As to contempts by publications reflecting on courts, &c., see *Re* Van Hook, 3 City Hall Recorder, 64; *Re* Spooner, 5 *Id.* 109; *Re* Strong, *Id.* 9; *Re* Yates, 4 Johns. 317; 6 Johns. 337; *Re* Eliz. Mayer, 2 Barnard. 43; *Ex-parte* Jones, 13 Ves. Jr. 237; *Re* Crawford, 18 Law Jour. 225, Q. B.; 13 Jur. 955; *Ex-parte* Turner, 3 Mont. D. & G. 523; *Re* Van Sandau, 1 De Gex, 55; Birch *v.* Walsh, 10 Ir. Law R. 93; Rex *v.*

down the law that the publication of preliminary inquiries before magistrates is invariably lawful, but we are not prepared to lay down the law that the publication of such inquiries is invariably unlawful. There is no distinction between one court and another as respects the right of publishing reports of their proceedings, provided the proceedings be had publicly, and not *ex parte*.[1] And where a preliminary examination is publicly conducted, in the presence of the accused, there seems to be no reason why the same rule should not apply to such a proceeding, as to a trial. No privilege can be claimed for a report of an *ex parte* proceeding,[2] but probably it is now settled that a fair report

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Lee, 5 Esp. 123; Rex *v.* Hart, 1 Camp. 359; 1 Hawk. Pl. Cr., ch. 73; *Re* Crawford, 13 Q. B. 613; Starkie on Slander, by Folkard, ch. xxxvi; Moulton *v.* Clapham, Sir W. Jones, 431; March on Slander, 20; Hollingsworth *v.* Duane, J. B. Wallace, 77; Bayard *v.* Passmore, 3 Yeates, 438; Respublica *v.* Oswald, 1 Dallas, 319; Richmond *v.* Dayton, 10 Johns. 393; Folger *v.* Hoogland, 5 Johns. 235; *Re* Bronson, 12 *Id.* 460; The People *v.* Freer, 1 Cai. 485; The People *v.* Few, 2 Johns. 290; 2 Stark. Slander, ch. xiii; Solicitor's Journal, 1864, page 142; An Inquiry into the Doctrine lately Propagated concerning Attachments for Contempts, &c., by an English Constitution Crown Lawyer, London, 1769. (Historical Soc. Lib. N. Y.) See a pamphlet entitled Rights of Corporations and Reporters, published at Columbia, South Carolina, A. D. 1857, containing the report of the case of Robert W. Gibbs *v.* Edward I. Arthur and John Burdell. The City Council held, in 1855, a public meeting. The plaintiff, the editor of one of the city papers, being present, was asked by the mayor whether he had come to take notes of the proceedings. The plaintiff answering in the affirmative, the mayor ordered him to leave, which on the plaintiff's refusing to do, he was, on the mayor's orders, ejected by a police officer. The plaintiff sued the mayor and the officer, and the defense interposed was in the first instance that the mayor acted on a resolution of the city council forbidding the presence of reporters at their meetings, and subsequently the defense was set up that the city council had authorized the publication of their proceedings in a paper other than that with which the plaintiff was connected. Both these defenses failed, and the plaintiff recovered damages for being ejected.

[1] Lewis *v.* Levy, 36 Law Jour. R. 282, Q. B.; 1 El. B. & E. 537.

[2] Publishing the contents of an *ex-parte* affidavit, made to obtain the plaintiff's arrest, is not privileged as a report of judicial proceedings. (Cincinnati, &c. Co. *v.* Timberlake, 10 Ohio, N. S. 548.) Report of *ex-parte* preliminary proceedings not privileged. (Duncan *v.* Thwaites, 3 B. & C. 556; 5 D. & R. 447; Rex *v.* Lee, 5 Esp 123; Currie *v.* Walter, 1 B. & P. 523; Huff *v.* Bennett, 4 Sandf. 127; Stanley *v.* Webb, 4 Sandf. 21; 8 N. Y. 209; Matthews *v.* Beach, 5 Sandf. 256; Hoare *v.* Silverlock, 9 C. B. 20.) It was held by Martin, J., in Pinero *v.* Goodlake (15 Law Times, N. S. 676), that a fair report of proceedings before a magistrate was privileged.

of a proceeding before a magistrate, not being *ex parte*, is privileged. It being shown that the proceeding is judicial, in a public court, and not *ex parte*, a fair report of it is privileged. Thus, in an action for libel, it appeared that the defamatory matter was published in a fair report of proceedings before two judges at chambers, on applications under the Bankrupt Act, 5 & 6 Victoria, chapter 122, and it was held that the proceeding was judicial, and the report privileged.[1] And in respect to proceedings in jail under the same statute, and before a registrar in bankruptcy, it was held that the jail was a public court, and the proceedings judicial, and the report being a fair one, was privileged, although it affected a person not a party to the proceedings.[2] A committee of the House of Lords is a

[1] Simpson *v.* Robinson, 12 Adol. & El. N. S. 511; Smith *v.* Scott, 2 Car. & K. 580.

[2] Ryals *v.* Leader, Law Rep. 1 Ex. 296. Reports of proceedings in the bankruptcy court said to be privileged. (Behrens *v.* Allen, 3 Fost. & F. 135; and by Cockburn, Ch. J., in Wason *v.* Walter, Law Rep. IV, Q. B. 93.) "Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. Even in quite recent days, judges, in holding publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex-parte* proceedings as a *probable* exception from the operation of the rule. Yet *ex-parte* proceedings before a magistrate, and even before this court, as, for instance, on applications for criminal informations are published every day, but such a thing as an action or indictment founded on a report of such an *ex-parte* proceeding is unheard of, and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not *ex-parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected."

public court, and a report of their proceedings is privileged.[1] A report of the proceedings before a grand jury have been held not to be privileged.[2] The register of protests of bills and notes in Scotland, established by statute, was held a public document, to which every one had a right of access, and the publication of which was privileged.[3] Where one who had been convicted of murder and sentenced to death, while on the scaffold, and just before his execution, made a speech, in which he reflected upon one of the counsel who defended him on his trial, it was held that a report of this speech published in New York by the defendant in a newspaper of which he was editor, was not privileged either at common law or by the statute.[4]

§ 232. Where the judicial proceeding is public, and not *ex parte*, the report of what takes place is not the less privileged because published pending the proceeding, and before it has terminated; thus where a declaration for libel set out, in three separate counts, reports of three separate days' proceedings, respectively, (on two adjournments,) before a magistrate; the report of the first day

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[1] Kane *v.* Mulvany, 2 Ir. Com. Law, 402.

[2] McCabe *v.* Cauldwell, 18 Abb. Pra. R. 377. The true ground for this decision was that a proceeding before a grand jury is a secret *ex parte* proceeding, although it seems to rest on the assumption that a grand jury is not a "judicial body." As to report of a coroner's inquest, see East *v.* Chapman, M. & M. 46. The publication of a report of commissioners appointed to inquire into corporations, held not to be privileged. (Charlton *v.* Walton, 6 C. & P. 385.) A statement in a printed sheet issued by the Police Commissioners, to members of the force, to the effect that plaintiff had been dismissed from his situation under said Commissioners, as Inspector of Hackney carriages for fraud in his accounts, held not privileged. (Jackson *v.* Mayne, 19 Law Times, N. S. 399.) A publication of a report of an Inspector of Charities, under the charitable trust act, held not to be privileged. (Cox *v.* Feeny, 4 Fost. & F. 13.)

[3] Fleming *v.* Newton, 1 Cl. & Fin. N. S. 363.

[4] Sanford *v.* Bennett, 24 N. Y. 20. See Statute referred to in note to § 229 *ante*. If a highwayman shall at the gallows arraign the justice of the law, and of those who condemned him, he who publishes (the highwayman's language) shall not go unpunished. (4 Read. Stat. Law, 154; Dig. LL. 32.)

stating that the plaintiff was charged with perjury, and an adjournment, but reserving the report; the report of the second day also stating an adjournment in language intimating that there would be a report of the proceedings of the day to which the adjournment was; and the third stating the discharge of the party charged; and the jury found generally that the reports were fair and correct. Held, that the reports of the first two meetings did not lose the privilege by reason of the proceedings there reported not being final.[1] And in the same case, if we correctly interpret the report, it was held that the privilege of publishing a report of preliminary proceedings is not lost by the fact that the proceeding terminates in the discharge by the magistrate of the party accused.

§ 233. By becoming a member of a church the individual tacitly consents to submit to the church discipline.[2] The proceedings of the church to enforce its discipline are *quasi judicial*, and therefore those who complain, or give testimony, or act, or vote, or pronounce the result, orally or in writing, acting in good faith and within the scope of the authority conferred by this jurisdiction, and not falsely or colorably making such proceedings a pretence for covering an intended scandal, are protected by law.[3] One Miss Mary Jerom was the daughter of Quaker parents, and she was educated in that persuasion. She having acted in disobedience to the rules of the congregation, by frequenting places of public diversion and otherwise, she was warned to discontinue such practices, where upon she

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[1] Lewis *v.* Levy, 1 El. B. & E. 537.

[2] Remington *v.* Congdon, 2 Pick. 310; Jarvis *v.* Hathaway, 3 Johns. 180; Holt on Libel, 236; Shelton *v.* Nance, 7 B. Monr. 128; Whittaker *v.* Carter, 4 Ired. 461.

[3] Farnsworth *v.* Storrs, 5 Cush. 412; Fairchild *v.* Adams, 11 Cush. 549; Smith *v.* Youmans, 3 Hill (So. Car.) 85. If words, actionable in themselves, be spoken between members of the same church, in the course of their religious discipline, and without malice, no action will lie; and the jury are to decide whether there be malice or not. (Jarvis *v.* Hathaway, 3 Johns. 180.)

absented herself from *the meetings*, and declared that she no longer regarded herself as one of their body. After various fruitless attempts to reclaim her, the society proceeded in the usual way to a sentence of expulsion, which was reduced to writing, approved at a monthly meeting, and read by the defendant Hart, as clerk of the meeting, at a subsequent meeting for worship. This sentence of expulsion recited that the prosecutrix was born of Quaker parents, and educated in that society, but that, not regarding the truth they professed, she had imbibed erroneous notions; divers part of her conduct was inconsistent with a life of self-denial, and the futile attempts made to reclaim her; then declared her not a member of the society, until by repentance she acknowledged scripture doctrine. Miss Jerom, hearing of this sentence, sent her servant to the defendant for a copy, which he sent her under cover. After failing in an application for a criminal information, Miss Jerom procured the defendant to be indicted, tried, and convicted, for libel. On motion for a new trial, the court held that, no express malice being shown, the jury ought to have been directed to acquit the defendant, and ordered a new trial.[1] A vote passed by a board of trustees of a church, censuring C., a former treasurer of such church, for obstinately retaining the church funds received by him as such treasurer in his hands, and refusing to pay them over, is privileged; but if published maliciously, will support an action.[2] A communication of a church member, complaining of the conduct of his clergy, addressed to their common superior,

[1] Rex *v.* Hart, 1 W. Blacks. 386; 2 Burns' Eccles. Law, 779.

[2] Holt *v.* Parson, 23 Texas, 9. In an action for libel, the defendant pleaded that the words were used without malice, in a complaint to a church, of which both parties were members, for the purpose of bringing the plaintiff to trial before a committee thereof. The plaintiff replied that the charge was made willfully and maliciously: to which replication the defendant demurred. Held, that the replication was sufficient, although it contained no averment of want of probable cause. (Di a *v.* Holter, 6 Ohio, N. S. 228.)

is privileged.[1] And if a selectman, acting in his official capacity, accuse a member of the church of voting twice on the same ballot, it is privileged.[2]

§ 234. The privilege extended to proceedings to enforce church discipline, applies only to cases where both parties are members of the church. A complaint, to a church, against one of its members by one who is not a member, is not privileged; neither would such a complaint by a member against one who is not a member, be privileged;[3] but if the party accused voluntarily submits himself to the discipline of the church, all the proceedings are privileged.[4] Where a vote of excommunication from a church has been passed, and the offender thereby declared to be no longer a member, a subsequent reading of the sentence by the pastor, in the presence of the congregation, is privileged.[5]

§ 235. The publication of defamatory matter is not privileged, because made at a public meeting.[6] But at meetings of public bodies, having certain duties to perform, what is said in the exercise of such duties, pertinent to the matter in hand, and within the jurisdiction of the meeting, is privileged. Where at a meeting of a board of public officers, the commissioners of the New York Central Park, and in the course of a debate as to employing the plaintiff to do certain work for said commissioners, the defendant, a member of the board, objected to the employment of plaintiff on the ground that he had published an obscene libel; held, that the charge, being pertinent to the subject under discussion, was privileged,

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[1] O'Donoghue *v.* McGovern, 23 Wend. 26.

[2] Bradley *v.* Heath, 12 Pick. 163.

[3] Coombs *v.* Rose, 8 Blackf. 155.

[4] Remington *v.* Congdon, 2 Pick. 310.

[5] Farnsworth *v.* Storrs, 5 Cush. 412.

[6] Lewis *v.* Few, 5 Johns. 1; Anthon, 75; Davison *v.* Duncan, 7 El. & Bl. 229; 3 Campbell's Ch. Justices, 64, *note.*

and to entitle the plaintiff to maintain an action in respect of it, he must establish that the charge was made without reasonable or probable cause.[1] The defendant at a parish meeting for the nomination of overseers, imputed to the plaintiff who was put up for re-election, that whilst holding office previously, he had mis-appropriated the parish moneys, it was held to be privileged if made *bona fide*.[2] A shareholder of a railway company, having summoned a meeting of the shareholders, to which meeting he invited the reporters to the press, to attend, and at which meeting he made defamatory comments on the plaintiff, one of the directors, in his connection with the company, held that although they might have been privileged, if made at a meeting composed only of shareholders, they were not privileged at a meeting, at which other than shareholders were present.[3] The plaintiff being one of the overseers, and the defendant assistant overseer of a township, a rate was made on a railway company, against which it appealed. Shortly before the hearing of the appeal, a meeting of the overseers was called to consider the matter, when it was resolved to abandon the rate, and a vestry meeting was called to choose fresh overseers and consider the propriety of removing the defendant from his

[1] Viele *v.* Gray, 10 Abb. Pr. R. 1; 18 How. Pr. R. 550. At a meeting of the proprietors of a fishery, a charge made by one proprietor against another, of having violated the law regulating the fishery, was held to be privileged. (Bennett *v.* Barr, 8 Law Times Rep. N. S. 857.) The assessors of a town having been sued, applied to the town for reimbursement of their expenses, incurred in defending on the ground that they were sued in their official capacity. This was opposed because the suit was brought against them for making false answers, under oath to interrogatories proposed to them in another suit. The statement of a voter and tax-payer that they had perjured themselves therein, made at a town meeting held to consider their application, is privileged if made in good faith and without actual malice. (Smith *v.* Higgins, 16 Gray, (Mass.) 251.) Where a rate payer was unable to attend a parish meeting, assembled to investigate the accounts of a parish constable, he wrote a letter to the meeting, containing defamatory matter respecting such constable, such letter was held *prima facie* privileged. (Spencer *v.* Amerton, 1 Moo. & Rob. 470, and see § 239, *post*.)

[2] George *v.* Goddard, 2 Fost. & F. 689.

[3] Parsons *v.* Surgey, 4 Fost. & F. 247.

office. At that meeting the plaintiff imputed to the defendant neglect of duty in collecting the rates, and having made a rate which the overseers were obliged to give up, to which the defendant retorted by saying that the plaintiff had sold the rate-payers to the railway company, and had received a bribe from them for that purpose. After the meeting a person remarked to the defendant that he ought not to have said what he did without some foundation for it; to which the defendant replied that he believed there was reason for thinking that the plaintiff had had communications with the officers of the railway company. An action having been brought for the words used by the defendant at the meeting, query, whether the words were spoken under circumstances which rendered them a privileged communication? but held, assuming they were, there was evidence of malice proper to be left to the jury.[1] But it was held not to be a justification of a charge of official misconduct against a town officer that the charge was made in open town meeting, by the defendant, an inhabitant of the town, while animadverting on the conduct of the plaintiff as such officer, relative to a subject then before the meeting, in which the defendant was interested as a qualified voter.[2] And where a resolution introduced into a county medical society, for the expulsion of a member, upon the ground that he had procured his admission by false pretences, and without the legal qualifications, was held not to be privileged, because the society had no power to expel a member for such a cause.[3] Where the defendant, one of the selectman of the town, while he was acting as a public officer, and at an election in an open town meeting, charged the plaintiff with having put two votes into the ballot-box, it was held that the charge was privileged, principally on

[1] Senior *v.* Medland, 4 Hurl. & N. 843; 4 Jur. N. S. 1039.

[2] Dodds *v.* Henry, 9 Mass. 262.

[3] Fawcett *v.* Charles, 13 Wend. 473.

the ground that the defendant had a duty to perform, and that the charge was made in the performance of his duty.[1] It was held[2] that defamatory matter concerning a Roman Catholic Priest was not privileged by the fact of its having been spoken at a meeting held to petition parliament against making a grant towards the support of a Roman Catholic College.

§ 236. Nor is the publication of defamatory matter privileged because made in a true report of the proceedings of a public meeting, for "there is no analogy between the proceedings at a public political meeting, and the proceedings in a court of justice;"[3] and therefore it has been held that a publication of defamatory matter made in a report of proceedings at a public meeting called to petition parliament against making a grant in support of a Roman Catholic college, was not privileged.[4] And where the defamatory matter was contained in a report of the proceedings of a vestry meeting, it was held not to be privileged; thus, an English statute 18 and 19 Vict., ch. 120, provided for the appointment of a medical officer in each parish, who was to report from time to time to the vestry, and such reports were to be published annually, in the month of June. A report was made to the vestry in February, and in the same month published by the defendant in a newspaper of which he was the editor and proprietor, in and as part of the proceedings of the vestry. This report contained a charge of misconduct on the part of the plaintiff; he sued the defendant for libel, and it was held that the publication, being a true report of what took place at the vestry, did not render it privileged.[5]

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[1] Bradley *v.* Heath, 12 Pick. 163.

[2] Hearne *v.* Stowell, 12 Adol. & El. 719.

[3] Lewis *v.* Few, 5 Johns. 1.

[4] Hearne *v.* Stowell, 12 Adol. & El. 719; 4 Per. & D. 696; Wilson *v.* Reed, 2 Fost. & F. 149; Pierce *v.* Ellis, 6 Ir. L. R., N. S. 55; Davidson *v.* Duncan, 7 El. & B. 231.

[5] Popham *v.* Pickburn, 7 Hurl. & N. 891. Query, would the publication have been

But in another case, a report of the condition of town schools, made and published as required by law, by the superintending school committee, and charging the prudential committee of the district with unlawfully employing a teacher, and putting her in charge of a school, taking possession of the school-house, and forcibly excluding the general committee and the teachers employed by them, but not imputing corrupt motives, held privileged.[1] And so it was held that the publication, by a member of the Massachusetts Medical Society, of a true account of the proceedings of that society in the expulsion of another member for a cause within its jurisdiction, and of the result of certain suits subsequently brought by him against the society and its members, on account of such expulsion, is privileged; although it speaks of the expelled member as "the offender," and remarks that "the society has vindicated its action in this case, and its right to act in all parallel cases."[2]

§ 237. The right to seek redress is not limited to seeking it in a court of justice.[3] Every one who is aggrieved,

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privileged had it been made by the defendant after the report had been published by the vestry, as required by the statute? (*Id.*)

[1] Shattuck *v.* Allen, 4 Gray, 540; and see Haight *v.* Cornell, 15 Conn. 74. Where the defendant made a speech at a public meeting, and afterwards handed a copy of it to the reporters, who published it in a newspaper, held that such publication was not privileged. (Pierce *v.* Ellis, 6 Ir. C, L. 55.)

[2] Barrow *v.* Bell, 7 Gray, 301.

[3] Padmore *v.* Lawrence, 11 Adol. & El. 380; 3 Per. & D. 209; Kine *v.* Sewell, 3 M. & W. 297; Robinson *v.* May, 2 J. P. Smith, 3. Semble, that words spoken to a police officer engaged in an endeavor to detect a crime, are privileged. (Smith *v.* Kerr, 1 Barb. 155. See, however, Dancaster *v.* Hewson, 2 M. & R. 176.) Plaintiff assaulted the defendant on the highway; defendant, meeting a constable, requested him to take charge of the plaintiff, and the constable refusing to arrest the plaintiff unless the defendant would charge him with felony, the defendant did so; held, on demurrer to the defendant's plea setting up these circumstances, that they did not render the charge of felony a privileged publication. (Smith *v.* Hodgkins, Cro. Car. 276; and see Allen *v.* Crofoot, 2 Wend. 515; Lathrop *v.* Hyde, 25 Wend. 448.) In Johnson *v.* Evans, 3 Esp. 32, plaintiff, a female, had been in the employ of defendant, and on discharging her, some difference arose, the defendant charging the plaintiff with endeavoring to cheat him respecting her wages, and said,

or who has reasonable and probable cause to believe himself aggrieved, may, *in good faith*, seek redress from any body, officer or individual, *having jurisdiction, power or authority* to redress the wrong or supposed wrong (§ 238*a*). Whatever is spoken or written in such a pursuit for redress is privileged. For defamatory matter published in seeking relief other than from a court of justice, the action is said to be analagous to an action for malicious prosecution,[1] with a distinction or supposed distinction which may be illustrated as thus: that redress for malicious prosecution cannot be had in an action in form for slander or libel (§ 220), while for defamatory matter published in seeking redress from any source other than a court of justice, redress may be had in the form of an action for slander or libel. To an action in form of slander or libel, it is a defense merely to show the publication was made to a court of justice, but it is not a defense merely to show that the publication was made upon an application for redress other than to a court of justice,

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"She is a thief, and tried to rob me of part of her wages." Defendant sent for a constable to give plaintiff in charge, and repeated these words to the constable, but did not give plaintiff in charge; the only publication proved was to the constable, and plaintiff was nonsuited. In an action of slander against the defendant, for charging the plaintiff with theft, where it appeared that the words spoken were only expressions of suspicion, founded upon facts detailed by him at the time, made prudently and in confidence to discreet persons, in good faith, with a view to their aiding him to detect the offender and recover the property stolen, it was held that they were not slanderous, but justifiable and proper. (Grimes *v.* Coyle, 6 B. Monr. 301.) The defendant having some cause to suspect the plaintiff of dishonesty, went to plaintiff's relations and made to them a charge of theft against the plaintiff; and it appearing that the object in making the communication was rather to compromise the felony than to promote inquiry, or to enable the relations to redeem the plaintiff's character, the publication was held not privileged. (Hooper *v.* Truscott, 2 Bing. N. R. 457.) The defendant, having lost goods by theft, went to the plaintiff's house with a police officer, and, in answer to questions as to the object of his visit, accused plaintiff of the theft, and stated the grounds of his belief. In an action of slander, held, that this was a privileged communication, if made *bona fide*, unless express malice were found by the jury. Nor is the privilege defeated by the fact that the charges were made in the presence of third parties and in an intemperate manner. (Brown *v.* Hathaway, 13 Allen (Mass.), 239. See Davis *v.* Sneed, Law Rep. V, Q. B. 608.)

[1] Howard *v.* Thompson, 21 Wend. 319; Cook *v.* Hill, 3 Sandf. 349.

unless it be also shown that the forum addressed had jurisdiction and the application was honestly made—*i. e.* in good faith and with reasonable and probable cause. To support malicious prosecution, besides showing that the prosecution has terminated, it must be shown that the publication was without probable cause *and* with malice, *i. e.* bad motive; bad motive alone will not support the action, if there was probable cause; while to support an action for a publication in seeking redress extra-judicially, it is sufficient to show either want of jurisdiction in the forum addressed, or want of probable cause or bad motive; for the right to appeal to a court of justice *is general and without reference to the motive* wherever probable cause exists; but the right to seek redress, *extra-judicially, is limited to seeking it with probable cause and with a good motive* from a body, officer or individual having jurisdiction or power to afford relief. In a case where the defendant had written defamatory matter to the superior of the plaintiff, an ecclesiastic, it was alleged in the complaint that the publication was made maliciously; the plea was in effect merely that the publication was made in seeking redress from an officer having jurisdiction to grant relief. On demurrer, the plea was overruled, and it was held that to constitute a defense, the plea should have gone on and alleged reasonable and probable cause for making the complaint, and that it was made with good motives.[1] It has been held that within the foregoing privilege, are: petitions to the sovereign,[2] or to parliament,[3] or to the legislature,[4] or to the lieutenant-governor of a province (Canada),[5] or to the governor of a state.[6] a memorial pre-

[1] In O'Donaghue *v.* McGovern, 23 Wend. 26, and in Perkins *v.* Mitchell, 31 Barb. 461, a distinction is made between a complaint made to a court of justice and a complaint made elsewhere.

[2] Hare *v.* Mellor, 3 Lev. 138.

[3] 1 Lev. 240, and *ante*, note 4, p. 346.

[4] Reid *v.* Delorme, 2 Brevard, 76.

[5] Stanton *v.* Andrews, 5 Up. Can. Q. B. Rep. 211, O. S.

[6] Gray *v.* Pentland, 2 S. & R. 23; 4 *Id.* 420; and see Rogers *v.* Spaulding, 1 Up. Can. Q. B. 258; Corbett *v.* Jackson, *id.* 128.

sented to a board of excise,[1] a petition to a council of appointment praying the removal of the plaintiff from office;[2] a memorial to the post-office department charging fraud on the plaintiff, a successful bidder for post-office patronage;[3] a letter to the Secretary of War, with the intent to prevail on him to exert his authority to compel the plaintiff (an officer in the army) to pay a debt due from him to defendant;[4] a letter to the superior officer of the plaintiff, having power to remove him, and charging him with fraud in his office;[5] a letter written to a bishop informing him that a report was current in a parish in his diocese, that the plaintiff, the incumbent of a district in that parish, had assaulted a schoolmaster;[6] charges preferred to a lodge of Odd Fellows by one member of that lodge against another, and for an offense which the lodge under its rules had the right to investigate.[7] The trustees

[1] Vanderzee *v.* McGregor, 12 Wend. 545.

[2] Thorne *v.* Blanchard, 5 Johns. 508. Where the complaint is to a person competent to redress the grievance, no action lies against the publisher, whether his statement be true or false, or his motives innocent or malicious. (*Id.*) See Harrison *v.* Bush, 5 El. & Bl. 344.

[3] Cook *v.* Hill, 3 Sandf. 341. A letter of complaint written to the Postmaster-General, *bona fide*, of even imaginary grievances, would be privileged; and the defendant, under the general issue, may show that it was written under such circumstances as would make it a protected communication. (Woodward *v.* Lander, 6 C. & P. 548.)

[4] Fairman *v.* Ives, 5 B. & Ald. 643; 1 D. & R. 252.

[5] Howard *v.* Thompson, 21 Wend. 319; Blake *v.* Pilfold, 1 M. & Rob. 198. A petition of parties interested, to the proper authorities, against the appointment of one on the ground of his bad character, as disqualifying him for the appointment, is not actionable as a libel. (Harris *v.* Harrington, 2 Tyler, 129.) A letter from an inhabitant of a school district, to the school committee, complaining of a schoolteacher, is conditionally privileged. (Bodwell *v.* Osgood, 3 Pick. 379; and see Maitland *v.* Bramwell, 2 Fost. & F. 623.)

[6] James *v.* Boston, 2 C & K. 4. If written merely with the honest intention of calling the attention of the bishop to a rumor in the parish, which was bringing scandal on the church, and not from any malicious motive; and it is not material that the writer of the letter did not live in the district to the incumbent of which the letter refers. (*Id.*) And see O'Donaghue *v.* McGovern, 23 Wend. 26.

[7] Streety *v.* Wood, 15 Barb. 105. Where A. accused B. of theft before certain members of a lodge of Odd Fellows, of which both were members, and in an action for slander by A., B. attempted to justify what he said, by showing that it was the duty of Odd Fellows to keep their lodge pure, the justification was held to be insufficient. (Holmes *v.* Johnson, 11 Ired. 55). Defendant, who was a sergeant in a volunteer

of the College of Pharmacy in New York appointed a committee to inquire and report upon the capacity of the plaintiff as drug inspector of the port of New York, with a view upon the facts reported to petition for the removal of the plaintiff from his office. The committee made a written report to the board of trustees, who forwarded it to the Secretary of the Treasury,—held that the report was privileged.[1] The defendant, the deputy-governor of Greenwich Hospital, wrote and printed a large volume, containing an account of the abuses of the hospital, and reflecting with much asperity upon many of its officers; he distributed copies of this book to governors of the hospital *only;* an application for a criminal information against the defendant was denied, with the observation that the distribution had been only to persons competent to redress the grievances complained of.[2] The defendant was clerk to a board of guardians, and plaintiff the medical officer under said board. C. was the relieving officer under said board. A pauper was to be removed to another district, but previous to his removal he was to be examined by plaintiff. The defendant, under the direction of the board, called twice upon plaintiff, each time requesting him to make the examination of the pauper; but plaintiff neglected to

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corps, of which plaintiff also was a member, represented to the committee by whom the general business of the corps was conducted, that plaintiff was an unfit person to to be permitted to continue a member of the corps; that he was the executioner of the French king, &c. Lord Ellenborough held the communication privileged. (Barbaud *v.* Hookham, 5 Esp. 109.)

[1] Van Wyck *v.* Aspinwall, 17 N. Y. 190, affirming S. C. *sub. nom.* Van Wyck *v.* Guthrie, 4 Duer, 268; and see Haight *v.* Cornell, 15 Conn. 74.

[2] Rex. *v.* Baillie, 21 State Trials, 1; Andr. 229. In another case, the plaintiff had been a general commanding a corps of irregular troops during the war in the Crimea. Complaint having been made of the insubordination of the troops, the corps commanded by the plaintiff was placed under the superior command of V. The plaintiff then resigned his command, and V. directed S. to inquire and report on the state of the corps, and referred S. to the defendant for information. Defendant, in a conversation with S., made a defamatory statement in respect to the plaintiff on his giving up the command of his corps: held that it was properly left to the jury to say whether the communication was relevant to the inquiry. (Beatson *v.* Skene, 5 Hurl. & N. 838.)

make such examination. The defendant afterwards went to C. and complained of this neglect on plaintiff's part, and stated that plaintiff was "not sober," or, as appeared on the trial, "as drunk as a sow." Whereupon C. served plaintiff with a formal order to make the examination,— held that the statement by defendant to C. was conditionally privileged.[1] The defendant, a subscriber to a charity, wrote a letter to the committee of management of the society concerning the plaintiff, their secretary,—held privileged, if made in an honest belief in the truth of the statements.[2] And where the defendant was a life governor and medical officer of a public school, to which school plaintiff supplied butchers' meat, the defendant stated to the steward of the school that defendant sold meat by the yard, and had been hooted out of the market, innuendo that he sold bad meat. It appearing that it was the steward's duty to examine the meat supplied to the school, held that if the defendant's statement was without malice it was privileged.[3] The defendant, the commanding officer of a regiment, wrote letters to his immediate superior, containing charges against the plaintiff, the colonel in command; defendant also had a conversation with a member of parliament as to a question to be put in the House of Commons relative to the dismissal of the plaintiff. It was held that both the letters and the conversation were privileged, if made without malice.[4]

§ 238. The privilege referred to in the last preceding section exists not only where the body officer, or individual appealed to has *direct* jurisdiction or power, but also in the cases where there is an *indirect* jurisdiction or power to afford redress: as thus where the plaintiff was a justice of the peace for the county, and in the habit of

[1] Sutton *v.* Plumridge, 16 Law Times, N. S. 741.

[2] Maitland *v.* Bramwell, 2 Fost. & F. 623.

[3] Humphreys *v.* Stillwell, 2 Fost & F. 590.

[4] Dickson *v.* Wilton, 1 Fost. & F. 419; see Bell *v.* Parker, 10 Ir. L. R. N. S. 279.

acting at petty sessions held in a borough. The defendant, an elector and inhabitant of the borough signed a memorial addressed to the Secretary of State for the Home Department, complaining of the conduct of plaintiff as a justice during an election for a member to represent the borough in parliament, and praying that he would cause an inquiry to be made into the conduct of plaintiff, and that on the allegations contained in the memorial being substantiated, he would recommend to her Majesty that plaintiff be removed from the commission of the peace. The jury having found that the memorial was *bona fide*, it was held that it was a privileged communication, inasmuch as plaintiff had both an interest and a duty in the subject-matter of the communication; and the Secretary of State had a corresponding duty, a justice of the peace being appointed and removed by the sovereign.[1] And in the case where the plaintiff was an officer in the army, and the defendant, a creditor of plaintiff's, wrote concerning plaintiff to the Secretary of War, it was held that although the Secretary had no *direct* power or authority, yet as he might exercise some influence, the communication was privileged.[2]

An additional protection to persons seeking redress *extra judicially*, from public officers, is found in the difficulty, referred to hereafter, (§ 377*a*) which the plaintiff may experience in proving the publication of the defamatory matter.

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[1] Harrison *v.* Bush, 5 El. & Bl. 344. In Rex *v.* Bayley (3 Bac. Abr. tit. Libel, A 2, cited 5 B. & Ald. 647), the defendant had addressed a letter to General Willes and the four principal officers of the guards, to be by them presented to the King, stating that the prosecutor had obtained from him (defendant) a warrant for the payment of money due him (defendant) from the government under promise of paying the defendant such money, and that the prosecutor had received the money and not paid it over to defendant. The court held this not a libel, but a representation of an injury shown up in a proper way for redress; yet neither the officers nor the King could give the defendant *direct* assistance in obtaining payment of the money wrongfully withheld.

[2] Fairman *v.* Ives, 5 B. & Ald. 643; Perhaps Atkinson *v.* Congreve, 7 Ir. L. R. N. S. may be within the same rule.

§ 238*a*. That applications for redress extra judicially, to a body officer or individual having power or jurisdiction *directly* or *indirectly*, to afford redress are privileged appears to be well settled, and the decisions, with only *two* exceptions, either assume or expressly declare that unless the power or authority to grant relief exists either directly or indirectly, the publication is not privileged as thus: where the defendant, a physician, gave a certificate that the plaintiff was insane, on which to base proceedings under a statute to have the plaintiff confined in an asylum; for the charge contained in this certificate the plaintiff brought an action against the defendant, and it was held that he could justify only by showing that the provisions of the statute under which the certificate purported to have been given had been strictly complied with. And by the court, "Where one intervenes voluntarily in a special proceeding not known to the common law, and not resulting in a judgment according to its forms, he must see that *jurisdiction* is acquired, and that there is in reality a proceeding in court, before he can claim any privilege."[1] A letter written to the Secretary of State, complaining of the conduct of the plaintiff as clerk to a board of magistrates, was held not to be privileged because addressed to an officer not having power to redress the wrong complained of.[2] The case lastly referred to was affirmed in the Exchequer Chamber. So where the defendant at a meeting of a county medical society, introduced a resolu-

[1] Perkins *v.* Mitchell, 31 Barb. 461.

[2] Blagg *v.* Sturt, 10 Q. B. 899; 11 Jur. 181; 8 Law Times, 135; 16 Law Jour. 39, Q. B. In an action for libel it appeared that the defendant had lodged at the plaintiff's house and on leaving missed a memorandum book and other articles, whereupon he wrote a letter to the plaintiff's wife, in which he accused the plaintiff of having taken the missing articles, and threatened to expose him if he did not return them; the jury found that there was no malice in fact,—*Held*, nevertheless, the sending the letter to the wife was not a privileged publication—she had no authority or power to redress the supposed wrong. (Wenman *v.* Ash, 13 C. B. 836; 22 Law J. Rep. (N. S.) C. P. 190; 17 Jur. 579; 1 Com. Law Rep. 592.) A letter written merely confidentially is not thereby privileged. (Brooks *v.* Blanchard, 1 Cr. & M. 779; 3 Tyrw. 844.)

tion for the expulsion of plaintiff, a member of said society which resolution—contained matter defamatory of the plaintiff; in an action for libel for publishing said resolution, it was held that inasmuch as the society had *no power to expel, a member*, the publication could not be privileged, as a means of seeking redress.[1] Again,[2] where the defamatory matter was contained in an affidavit made by the defendant, at the request of one H. F. to be presented to the Governor of the State of New York, to induce said governor, to revoke a warrant issued by said governor, for the arrest of said H. F. upon a requisition from the Governor of California. After a finding by referees in favor of the defendant, on the ground that the publication was privileged, the Supreme Court at a General Term ordered a new trial, and held there was no privilege because the governor had no jurisdiction to revoke his warrant, the court saying that in all cases of seeking redress the "tribunal individual or body must be vested with authority to render judgment, or make a decision in the case, or to entertain the proceeding, in order to give them the protection of privileged communications," One of the two exceptions, above referred is the case where the defendant a time keeper employed, on public works under a public department, wrote a letter to the Secretary of the Department, reflecting upon the contractor for the works. The secretary had no authority over the contractor, but it was held that if the letter was written in *good faith*, although to the wrong person it was privileged. But that the fact of the communication being made to a person having no authority to afford redress, was a circumstance from which want of good faith might be inferred.[3] This was but a *nisi prius* decision, nevertheless we are of the opinion, the contrary decisions, notwithstanding, that we

[1] Fawcett *v.* Charles, 13 Wend. 473.
[2] Hosmer *v.* Loveland, 19 Barb. 111.
[3] Scarll *v.* Dixon, 4 Fost. & F. 250.

have here the true rule of law. One who has reasonable and probable cause to believe himself wronged, should be privileged in applying to any source, which he has reasonable and probable cause to believe can grant him redress. In seeking redress *judicially*, a want of jurisdiction in the court to which the complaint may be exhibited, does not take away the privilege nor should it where the redress is sought extra judicially.[1] The other of the two exceptions above referred to is the case,[2] where the plaintiff was a district school teacher, and the defendant a freeholder within the school district. The alleged libel was a representation signed by the defendants, charging the plaintiff with not being "a man of strictly temperate habits, and good moral character such as the law demands," &c. This representation was delivered to the local superintendent of schools, who not conceiving himself authorized to act upon it, unless it came through the school trustees, handed the document to them. On the trial the plaintiff had a verdict. The court in banc granted a new trial and observed that the publication was *prima facie* privileged and not the less so because made by mistake to the wrong quarter.

§ 239. Where the privilege now under consideration may be exercised by word of mouth, orally, it also may be exercised by writing; unless, perhaps, where it is shown that it is exercised by writing rather than orally to serve some unworthy purpose; thus where an alleged libel consisted of charges made by the defendant against the plaintiff, a constable, contained in a letter to a meeting of ratepayers, it was held that inasmuch as the charge, if made orally, would have been privileged, it was privileged when made in writing, unless the plaintiff could establish that the

[1] See note 4, p. 348, *ante*; 1 Wms. Saund. 138, Ed. of 1871. The creditor was mistaken in Fairman *v.* Ives, *ante*, note 2, p. 388; and the court held the defendant protected by "probable cause," in Howard *v.* Thompson, 21 Wend. 330.

[2] McIntyre *v.* McBean, 13 Up. Can. Q. B. Rep. 531.

defendant wilfully absented himself from the meeting as a pretence for writing.[1] So where the defendant is privileged to present a petition or memorial for redress, he does not forfeit his privilege by presenting the petition or memorial to different individuals to obtain their signatures thereto, nor, as it seems, by printing such petition or memorial, provided the presenting for signatures or the printing be done with a *bona fide* intent to carry out the purpose of the petition or memorial, and not otherwise.[2] The plaintiff was employed as manager of the factories of a joint stock company, and the auditors of the company, in auditing the plaintiff's accounts, appended to their report the following statement:—"The shareholders will observe that there is a charge of 1306l. for deficiency of stock, which the manager is responsible for. His accounts have been badly kept, and have been rendered to us very irregularly." The directors submitted their own report, together with that of the auditors, to the ordinary general meeting of the shareholders of the company, according to the usual practice, and it was resolved by the meeting that the reports should be printed and sent to the shareholders. The reports, including the above statement, were accordingly sent to a printer printed, and circulated among the shareholders, and used at an ad-

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[1] Spencer *v.* Amerton, 1 M. & Rob. 470.

[2] Vanderzee *v.* McGregor, 12 Wend. 455; Cook *v.* Hill, 3 Sandf. 341; Rex *v.* Ballie, 21 State Trials, 1; Andr. 229; Van Wyck *v.* Aspinwall, 17 N. Y. 190. and *ante*, note 2, p. 386. Where in an action of slander against the defendant, a surveyor, employed by a committee to investigate the truth of reports against the plaintiff, as having executed improperly contract work for them, which the defendant alleged on such inquiry to be the case, held that such report was not a privileged communication, it being found by the jury that the reports originated with the defendant and were false. (Smith *v.* Matthews, 2 M. & Malk. 151.) An officer of the navy has no right to make communications, except to the government, upon subjects with which he becomes acquainted in his professional capacity; and, therefore, a letter written to Lloyd's Coffee-house, about the conduct of the captain of a transport-ship, by a lieutenant who was superintendent on board, was held not to be a privileged communication. (Harwood *v.* Green, 2 Car. & P. 141; and see Robinson *v.* May, 2 J. P. Smith, 3.)

journed meeting of the shareholders. The plaintiff having brought an action for libel against the company; held, that, as it was the duty of the directors to communicate the report of the auditors to the shareholder, and it was for the interest of all the shareholders to be informed of the report, the printing and publication of the report were *prima facie* privileged; and there was no evidence of express malice for the jury.[1]

§ 240. Every one has, also, and independently of the privileges heretofore referred to, the right to publish all that he has reasonable and probable cause to believe necessary to protect his person, his property, or his reputation from loss or injury. As where the defendant advertised that his wife had eloped from him, and cautioned all persons from trusting her, a motion for a criminal information against him for making this publication was denied, because the advertisement was the only means he could adopt to protect himself.[2] So where A., who had dealt with the defendant, a butcher, suddenly ceased to deal with him, alleging as a reason that defendant had made charges against him, A., for meat which had not been delivered at A.'s house, the defendant wrote a letter to A., protesting his innocence of the alleged overcharge, and stating, in effect, that the meat had been improperly disposed of by the defendant's servants. For writing this letter, the plaintiff—whose wife was a servant in the family of A.—brought an action for libel; it was held that if by the letter the defendant meant *bona fide* to defend himself, it was a conditionally privileged publication.[3] The plaintiff, an attorney's clerk, made an affidavit in a suit in

[1] Lawless *v.* Anglo Egyptian Cotton Co., Law Rep. IV. Q. B. 262.

[2] Rex. *v.* Enes, Andr. 229, and see *ante*, § 226.

[3] Coward *v.* Wellington, 9 C. & P. 531. The prosecutor published in a newspaper matter reflecting upon the character of A. The defendant, an attorney, and the attorney for A., publishe l a counter-statement, held that if such statement was honestly intended to vindicate A., it was privileged. (Reg. *v.* Veley, 4 Fost. & F. 1117.)

which the defendant appeared for an opposite party. The affidavit reflected upon the defendant, whereupon defendant wrote to plaintiff's employers complaining that the affidavit of plaintiff suppressed the truth. The defendant's letter held a conditionally privileged publication.[1] And where Q., having had no previous knowledge of B., a trader, sold him goods to the amount of £62 10*s*., at two months' credit,—upon going to B.'s shop at the expiration of the credit, A. found that the whole stock in trade, including a portion of the goods sold by him, had been sold by auction the previous day, by B.'s desire, and at a reduction of 30 per cent., and that the proceeds were in the hands of S., the auctioneer. Upon inquiry, A. could not learn where B. was to be found. He thereupon went to his attorneys, and they, on his behalf, served on S. a notice not to part with the proceeds of the sale, the said B. having committed an act of bankruptcy. B. had, in fact, committed no act of bankruptcy, the goods having been sold for the purpose of his retiring from business. Held, by Tindal, C. J., Coltman, J., and Erle, J. (Cresswell, J., *dissentiente*), that A. had such an interest in serving the notice as to render it a privileged communication, if it was served with good faith and under the *bona fide* belief that B. had committed an act of bankruptcy.[2] Where the defendant published an advertisement as follows: "Ten guineas reward. Whereas, by a letter received from the West Indies, an event is stated to be announced by a newspaper that can only be investigated by these means,—this is to request that if any person can ascertain that J. D. (the plaintiff, describing him) was married previous to 9 A. M. on, &c., and will give notice to J. (the defendant), he shall receive the reward,"—held that if the publication was with the *bona fide* view of finding out the fact referred

[1] Buckley *v.* Kiernan, 7 Ir. L. R. N. S. 75.

[2] Blackham *v.* Pugh, 15 Law Jour. Rep. 290, C. P.; 2 C. B. 611; approved, Davies *v.* Sneed, Law Rep. V, Q. B. 511.

to, it was privileged, and the jury found a verdict for the defendant.[1] And where the libel was contained in an advertisement stating the issue of process against the plaintiff, and that he could not be found, and offering a reward for such information as should enable him to be taken; plea, that a *capias* had been issued and delivered to the sheriff, and that the plaintiff kept out of the way, and that the advertisement had been inserted at the request of the party suing out the writ, to enable the sheriff to arrest; held a sufficient defense.[2] The plaintiff had a litigation with an insurance company of which the defendant was the agent. The plaintiff published a pamphlet accusing the directors of the company of fraud, &c. This was met by a pamphlet published by the directors. Afterwards, a person desirous of effecting an insurance, inquired of defendant as to the truth of the charges contained in the plaintiff's pamphlet, and thereupon the defendant handed to such person a copy of the pamphlet published by the directors; for this the plaintiff sued the defendant, and it was held that the defendant's act was *prima facie* privileged, and that if he acted without malice, no action could be maintained.[3] An underwriter, in discussing with the agent of the assured a claim for a total loss, made a statement purporting to be founded upon a letter implying a design on the part of plaintiff to make a dishonest claim; this was held to be privileged, unless made with an intent improperly to reduce plaintiff's claim.[4] Plaintiff, a member of a church of which C. was curate, was introduced by H., also a member of said church, to the defendant, the incumbent of a parish in which plain-

[1] Delany *v.* Jones, 4 Esp. 191. In Lay *v.* Lawson, 4 Adol. & El. 798, L'd Denman, referring to Delany *v.* Jones, said, "I have great doubt whether, there, the interest which the wife had in the inquiry could justify the offering a reward in a newspaper." See Finden *v.* Westlake, 1 Mo. & Malk. 461.

[2] Lay *v.* Lawson, 4 Ad. & El. 795.

[3] Koenig *v.* Ritchie, 3 Fost. & F. 413.

[4] Hancock *v.* Case, 2 Fost. & F. 711.

tiff was visiting, and where he became acquainted with F., one of defendant's parishioners. F. afterwards sued plaintiff for the price of a horse and other matters, and defendant was applied to by C. at plaintiff's instance, to arbitrate between plaintiff and F.; defendant at first declined, and on being further pressed to act, wrote C., as one reason for not acting, that plaintiff's conduct was so bad that he should not like to have his name associated with his affairs; and he enumerated certain charges which he had heard made against the plaintiff, adding that it grieved him much to make these statements respecting a man who evidently wished to be considered a religious man and a good church man, but that he thought it was his duty to unmask him to C., and that he would be thankful to be enabled to tell some of his neighbors that plaintiff's position at C.'s church was not quite what he (plaintiff) had led them to suppose it to be. C. handed this letter to plaintiff, who brought an action for libel against defendant. In an interview which defendant afterwards had with said H., defendant complained of the action which had been brought against him, and spoke of what he had heard against plaintiff's character. H. assured him he was mistaken, and that she would question plaintiff about the truth of these charges. She did so, and wrote defendant that she was confident he had been misinformed about plaintiff, as he had assured her there was not the slightest foundation for what was reported of him, and stated the reasons plaintiff gave in support of his character. Defendant wrote in reply, "Time will show whether I have been misinformed or not respecting Mr. W. (plaintiff). A writ has been served upon me, and a public investigation must therefore take place. If he states on oath, in the witness box, what he has stated to you, especially as to the charge of assault, he will be most certainly prosecuted for perjury, for there is not a shadow of a doubt but that the complaint of the servant

girl is correct." Plaintiff brought another action for libel in respect of this last letter. The actions were consolidated. The jury found there was no malice, and it was held that both letters were privileged, and verdict entered for defendant.[1]

§ 241. Every one who *believes* himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right, *in good faith*, to communicate such his belief *to that other* (§§ 243, 244).[2] He may make the communication *with* or *without* any previous request, and whether he *has* or *has not* personally any interest in the subject-matter of the communication, and although no reasonable or probable cause for the belief may exist. The right is founded on the *belief*. "All we have to examine is whether the defendant stated no more than what he believed, and what he might reasonably believe; if he stated no more then this, he is not liable."[3] If A. believes that B. is intending to rob C., he has the right to communicate his belief to C., without waiting for C. to inquire on the subject; and if in so doing he injures B., B. is without redress. The exigencies of society require that such a right should exist. A.'s duty to B. is simply not *unnecessarily* to injure him (§ 48). This right must be exercised as every other right is required to be exercised, in good faith (§ 40); and all communications made in the exercise of this right are conditionally privileged (§ 209).[4] The existence of this

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[1] Whitely *v.* Adams, 33 Law Jour. 89, C. P.

[2] Davis *v.* Reeves, 5 Ir. L. Rep. N. S. 79; Owens *v.* Roberts, 6 *id.* 79.

[3] Cockburn, Ch. J. Spill *v.* Maule, Law Rep. IV. Ex. 237. If a man act *bona fide* on honest belief of the truth of statements, made to him by others whom he believes to be credible persons, he is justified in so acting upon such statements, if he believes there is reasonable and probable cause for his so doing. The question is not whether they were right or wrong, it is what they told the defendant. (Cockburn Ch. J. Chatfield *v.* Comerford, 4 Fost. & F. 1008.) Hearsay is probable ground for belief. (Maitland *v.* Bramwell, 2 Fost. & F. 623; Lister *v.* Perryman, Law Rep. V. Ho. of Lords, Add. Cas. 365; rev'g Perryman *v.* Lister, Law Rep. III. Ex. 197.)

[4] For words "spoken in good faith, to those who have an interest in the com-

right, as will presently be shown, in cases where the communication is made by one having no personal interest in the subject-matter of the communication, and *without* any previous request has been questioned, nevertheless we feel justified in laying it down for law that the right exists as well where *there is not* as where *there is* a previous request, and whether the publisher *has or has not* any such personal interest. The right, as we conceive, in no wise depends either upon the fact of a previous request or upon the interest of the publisher, although the fact that the communication is made *officiously*, as it is termed, *i. e.*, unsolicited, or by one having no interests involved, may in *some* cases have a tendency to disclose the motive of the publisher in making the publication. The right, where the publisher is interested, or where the communication is made upon the request of the party in interest, seems never to have been doubted; thus where the language published imputed habits of intemperance to the plaintiff, a dissenting minister, was held privileged because spoken in answer to inquiries.[1] So a letter written to persons

munication, and a right to know and act upon the facts stated," no action can be maintained without proof of express malice. (Shaw, C. J., Bradley *v.* Heath, 12 Pick. 163.) (If the words are spoken in good faith, no malice can be proved. To prove malice would be to prove that the words were not spoken in good faith.) The law respects communications made in confidence, notwithstanding they may be false and erroneous, and prove injurious to the party. This rule applies equally to words written and spoken. Note to Wyatt *v.* Gore, Holt's N. P. 299; and see *ante*, note 1, p. 392. And one part of a publication may be privileged, because made to a person interested, and another part not privileged; thus where the plaintiff and defendant were jointly interested in property in Scotland of which C. was manager, defendant wrote to C. a letter, principally about the property and the conduct of the plaintiff with reference thereto, and containing a charge against the plaintiff with reference to his conduct to his mother and his aunt; held, that so much of the letter as related to the property was privileged, but the remainder was not. (Warren *v.* Warren, 1 Cr. M. & R. 250.) And see Humphreys *v.* Stillwell, 2 Fost. & F. 590.

[1] Warr *v.* Jolly, 6 C. & P. 497. A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which without this privilege would be slanderous and actionable. (Harrison *v.* Bush, 5 El. & Bl. 344.) Where a party has a mutual interest with another, he is justified in prevailing on him to become party to a suit, and expressions of angry and strong animadversion on the

who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which B., the writer of the letter, was likewise interested, was held to be a privileged publication.[1] And where A., being tenant of B., was desired by B. to inform him if he saw or heard anything respecting the game. A. wrote a letter to B., informing B. that his game-keeper (the plaintiff) sold game,—held, that if A. had been so informed, and believed the fact so to be, this was a privileged communication, and that the game-keeper could not maintain any action for libel.[2] So where the plaintiff had requested his friend R. A. to open a correspondence with the defendant in reference to certain charges made by the defendant concerning the plaintiff, held that letters written by the defendant to R. A. were privileged communications.[3] Where in an action for libel it appeared that the plaintiff was churchwarden and defendant clergyman of the same parish, and that differences having arisen between them in that relation, the plaintiff requested that the defendant's future communications should be by letter to the plaintiff's clerk. The defendant afterwards applied by letter to the clerk for rent which he conceived to be due him from the plaintiff. The clerk answered that defendant denied his liability, and in reply the defendant wrote the clerk, "This attempt to defraud me of the produce of the land is as mean as it is dishonest,"—held that the communication was not privileged in itself; that it was a question for the jury whether the language was

conduct of the party impeached, unless malicious, are privileged; and, in the case of words, the jury merely take into consideration the whole conversation, to see whether particular words, which may be actionable in themselves, are qualified so as not to convey the primary meaning. (Shipley *v.* Todhunter, 7 C. & P. 680.)

[1] On the trial a juror was withdrawn. (McDougall *v.* Claridge, 1 Camp. 267.) Representations as to stockholders. (Hanna *v.* De Blaquere, 11 Up. Can. Q. B. 310), as to school teacher. (McIntyre *v.* McBean, 13 *id.* 534.)

[2] Cockayne *v.* Hodgkisson, 5 C. & P. 543.

[3] Hopwood *v.* Thorn, 8 C. B. 293; Layer *v.* Begg, 15 Ir. L. Rep. N. S. 458.

justified by the occasion, but that the judge was right in directing the jury that the communication was actionable.[1] An attorney having at plaintiff's desire written the defendant demanding payment of an alleged debt, the defendant sent a letter to the attorney containing gross imputations on the plaintiff's character, wholly unconnected with the demand made upon him; held not a privileged communication, although the jury found that the letter was written *bona fide*, and negatived malice in fact.[2] A., the plaintiff, was party to a suit in chancery by B., his next friend, who was answerable for the costs of the suit. A. expressed a desire to change his solicitor in that suit, which coming to the knowledge of the defendant, he wrote a letter to B., in which, amongst other things, he stated that A. had been apprenticed to a civil engineer, and had had a present made him of his indentures, because he was worse than useless in the office; in action of libel by A., held that the letter was a privileged publication.[3] The owner of a building which has been set on fire may caution the persons employed by him therein against a particular person, suspected of being the incendiary; and his statements to them, if made in good faith for this purpose, are privileged communications, although they contain an unfounded criminal charge against the suspected person.[4] An insurance company, of

[1] Tuson *v.* Evans, 3 Per. & D. 396. Where, in an action for defamation, it appears that a defendant, authorized by his relation to the party addressed to make a "privileged communication," in professing to do so makes a false charge, the nference of malice is against him, and the burden is put on him to show that he acted *bona fide*. (Wakefield *v.* Smithwick, 4 Jones' Law (N. Car), 327; and see Cole *v.* Wilson, 18 B. Monr. 212.)

[2] Huntley *v.* Ward, 6 C. B. N. S. 514; and see *ante*, note 2, p. 389. A claim having been made against defendant's principal, he, defendant, wrote in reply and explaining that plaintiff had no cause of action, held privileged. (Halloran *v.* Thompson, 14 Ir. L. R. N. S. 334.) A correspondence was had between plaintiff's attorney, and defendant respecting a claim for damages made by plaintiff against defendant, defendant in justifying himself used defamatory language concerning the plaintiff, held privileged. (Sayer *v.* Begg, 15 Ir. L. R. N. S. 458.)

[3] Wright *v.* Woodgate, Tyr. & Gr. 12.

[4] Lawler *v.* Earle, 5 Allen, 22.

which the defendant was president, made an insurance against fire on the property of one Graves in the occupation of the plaintiff; an application was made to the company to alter the policy; the application was refused, and notice given that the policy would be cancelled. Graves inquired the reason for this, and was told by the defendant that the company would not insure any building occupied by plaintiff, as a building insured by the company and occupied by the plaintiff had been burned under very suspicious circumstances, adding, "What would you think of a man being seen round the store at two or three o'clock in the morning before the fire?" this was held to be a privileged communication.[1] The defendant had the right to give to Graves a reason for the company refusing to insure the building owned by him, and Graves was interested to know the opinion the defendant entertained concerning the plaintiff. So where the plaintiff was secretary of the Brewers' Insurance Company, and he being charged with misconduct was called upon to attend a board of directors, for the purpose of explanation, but declined to do so; whereupon the directors, after hearing the charges, passed a resolution that he had been guilty of gross misconduct, and dismissed him. The defendant, a director of that company and also of the London Necropolis Company, of which the plaintiff was auditor, communicated the fact of the plaintiff's dismissal "for gross misconduct" at a board meeting of the latter company, and proposed a resolution to dismiss him, and in answer to an inquiry from the chairman, said that the misconduct consisted in "obtaining money from the solicitors of the company under false pretences, and paying a debt of his own with it;" in an action for slander it was held that the publication was conditionally privileged.[2] The defendant

[1] Liddle *v.* Hodges, 2 Bosw. 537, affirmed 18 N. Y. 48.

[2] Harris *v.* Thompson, 13 C. B. 329; see Parsons *v.* Surgey, 4 Fost. & F. 247.

being a competitor with the plaintiffs for a contract with the Navy Board for African timber, the plaintiffs obtained the contract. Defendant then agreed to supply plaintiffs with a portion of the timber, and made no objection to taking their bills in payment. Afterwards this agreement was rescinded, and defendant wrote to a merchant who was to supply the timber to carry out the agrement, and of whom the defendant was a creditor, and the sole correspondent in London, reflecting on the plaintiffs' mercantile character, and putting said merchant on his guard against them. In an action for libel in making this communication, a verdict having been found for the defendant on the ground of privilege, the court granted a new trial.[1] The plaintiff was a dealer in beer, buying it of a brewer and selling it to publicans. Plaintiff wishing to open an account with the defendant, a brewer, one L., became his (plaintiff's) surety for the price of such beer as defendant should from time to time supply to plaintiff, he (defendant) promising to inform L. of any default made by plaintiff in his payments. After plaintiff and defendant had dealt together for some time, defendant went to L. and spoke in very abusive terms of plaintiff, saying he wished to cheat him, and that he had returned as unmerchantable, beer he (plaintiff) had adulterated, and that he was a rogue, &c. At this time there was a balance due defendant from plaintiff for beer, in respect of which L. was liable on his guarantee. Lord Ellenborough inclined to think the communication conditionally privileged; he refused, however, to non-suit the plaintiff, and a juror was withdrawn.[2] Plaintiff was engaged to superintend the

[1] Ward *v.* Smith, 6 Bing. 749. In Van Spike *v.* Cleyson, Cro. Eliz. 541, it is said not be actionable for one man to tell another *confidentially* not to trust another, if done only by way of counsel. Words of a tradesman that he would soon be a bankrupt, when spoken in confidence and friendship as a caution, held not to be actionable unless the jury found there was malice. (Herver *v.* Dowson, Bull. N. P. 8.)

[2] Dunman *v.* Bigg, 1 Camp. 268; and see Rex *v.* Jenneaur, 3 Bac. Abr. tit. Libel, 452; 2 Brownl. 151; 2 Burns' Eccles. Law, 179; Wilson *v.* Stephenson, 2 Price, 282.

works of a railway company, and subsequently, at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated. Afterwards a vacancy occurred in the situation of engineer to the commissioners for improving the river Wear, and the plaintiff became a candidate. The defendant wrote to C. introducing D. as a candidate, and C. having written defendant informing him that another person (the plaintiff) had suceeded in obtaining the appointment, the defendant wrote an answer to C. reflecting on the conduct of the plaintiff whilst superintendent of the railway works. It appeared that defendant and C. were both shareholders in the railway company, and that defendant managed C.s' affairs in the railway. Held, not a privileged publication.[1]

§ 241*a*. A party is justified in giving his opinion *bona fide* of the respectability of a tradesman *in answer to an inquiry concerning him*;[2] thus it is said that the owner of a public house cannot maintain an action against a neighboring publican for giving a bad character of such house to a person who, being in treaty for purchasing it, applied to the defendant for information, provided (as is stated) there is some evidence of the truth of the assertion.[3] In an action for slander by the plaintiffs, bankers at M., the charge was that in answer to a question from one Watkins, whether he (defendant) had said that plaintiffs' bank had stopped, defendant's answer was, "It was true; he had been told so." The proof was that Watkins met defendant and said, "I hear that you say the

[1] Brooks *v.* Blanchard, 1 Cr. & M. 779.

[2] Storey *v.* Challands, 8 C. & P. 234; otherwise when there is no inquiry. (*Id.*)

[3] Humber *v.* Ainge, Manning's Index, tit. Libel, pl. 13. Where a person authorized to make a privileged communication stated false matter, and the court left it to the jury to say whether "in communicating what he had heard and believed to be true," he acted in good faith, and there was no evidence that he had heard anything, nor none as to how he believed, it was held to be error. (Wakefield *v.* Smithwick, 4 Jones' Law (N. Car.), 327.)

bank of B. &. S. (plaintiffs) has stopped. Is it true?" Defendant answered, "Yes, it is; I was told so," and added, "It was so reported at C., and nobody will take their bills, and I have come to town in consequence." Watkins said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it." Defendant repeated, "I was told so." It further appeared that defendant had in fact been told there was a run on plaintiffs' bank, but not that it had stopped, or that nobody would take the plaintiffs' bills. It was held on the trial that the publication of the words alleged was proved, and the jury were instructed that if they thought the words were not spoken maliciously, the defendant ought to have a verdict. The jury found for the defendant. On plaintiffs' motion a new trial was ordered. On granting the new trial, the court discussed at length the question of malice, and the supposed distinction between malice in fact and malice in law, and stating that there was no instance of a verdict for the defendant on the ground of want of malice, held that instead of instructing the jury that if the words were not spoken maliciously they should find for the defendant, it should have been left to the jury as a previous question whether the defendant understood Watkins as asking for information for his own guidance, and that defendant spoke what he did merely out of honest advice to regulate the conduct of Watkins, then the question of malice in fact would have been proper as a second question to the jury, if their minds were in favor of the defendant upon the first. * * In granting a new trial the court does not mean to say that it may not be proper to put the question of malice as a question of fact for the consideration of the jury; for if the jury should think that when Watkins asked his question the defendant understood it as asked to obtain information to regulate his (Watkins') conduct, it will range under the cases of privileged communication, and the question of malice in fact will then be a necessary part of

the jury's inquiry; but it was not left to the jury to consider whether the question was understood by the defendant as an application for advice, and if not so understood the question of malice was improperly left to the jury.[1] Where a party interested in a building contract, on which the plaintiff had been engaged, applied to the defendant to recommend a surveyor to measure the work, when the defendant stated that he had seen the plaintiff take away some of the materials, upon which the plaintiff's employer enquired of the defendant if he had seen plaintiff taking them away, when he alleged that he had seen the plaintiff taking them, and that he hallooed to him; held, that the judge properly directed the jury to say, first, whether the words imputed felony; and secondly, that even if they did, the plaintiff was not entitled to recover, unless malice were expressly shown, or the jury believed, from the circumstances, that the defendant was actuated by malicious motives.[2] Where A. had sold goods to B., and afterwards, and before the delivery of the goods, C., *without* being asked or solicited in any way to do so, made representations to A. injurious to the credit of B. The representations were held not to be privileged, because made without any previous request.[3] And where A., seeing that apartments were to let at a house occupied by B., inquired who was the landlord, of C. (a neighbor of B.'s); C. told him, and added that B. had not paid his rent, and that if A. moved in his goods they would be seized. B. having sued C. for slander, the judge, at the trial, told the jury "he thought it was a privileged communication by C., unless they were of opinion it was made maliciously; that the question for them was, did the defendant honestly believe, at the time he spoke the words, that the statement contained in them was true, or was he actuated by malice

[1] Bromage *v.* Prosser, 4 B. & C. 247; 6 Dowl. & R. 296.

[2] Kine *v.* Sewell, 3 M. & W. 297.

[3] King *v.* Watts, 8 C. & P. 614; and see Pattison *v.* Jones, 3 M. & R. 101.

in making such statement?—held that there was no misdirection. But the court granted a new trial, not being satisfied of the fact whether C.'s statements were made officiously or in answer to A.'s inquiries.[1] The plaintiff was foreman to one Bryer, a bone merchant. In October, 1865, defendant gave Bryer an order for 100 quarters of sheep's hoofs. Plaintiff by mistake delivered 120 quarters. On the day following the delivery, plaintiff informed a clerk of the defendant of the mistake, and made an additional charge in defendant's account. In September, 1866, defendant called on Bryer, and said, "I lay 20 quarters of sheep's hoofs to your foreman and my clerk. There was an overture made by your foreman to divide the price of the 20 quarters, and pocket the money between them. It has been on my mind some time, and it is best to let you know it. Your foreman made improper overtures to my clerk to get the money for those 20 quarters and divide whatever the amount was," this was held to be privileged.[2] Whether a caution not to trust another, *bona fide* given to a tradesman, *without any inquiry on his part*, is a privileged communication, was discussed in Bennett *v.* Deacon,[3] and it was held by Tindal, Ch. J., and Erle, J., that it was, and by Coltman and Cresswell, JJ., that it was not. The effect of a previous inquiry was very elaborately discussed in a case where C., the mate of a ship, wrote to the defendant, falsely charging his captain (the plaintiff) with having endangered the vessel and lives of the crew by continued drunkenness. The vessel was at this time in port, and likely to continue there a few days. The defendant, who was slightly acquainted with the owner of the vessel, but was not interested in the vessel, and had no inquiry made of him, believing in the truth of the letter, showed it to the owner, who, in consequence,

[1] Chapman *v.* Wright, 1 Arn. 241.

[2] Caulfield *v.* Whitworth, 18 Law Times, N, S. 527.

[3] 2 Com. B. 628; and see Lewis *v.* Chapman, 16 N. Y. 369.

dismissed the captain. In an action for libel by the captain, upon these facts appearing on the trial, the chief justice directed the jury that if the defendant acted honestly and *bona fide*, the publication was justifiable, and their verdict must be for the defendant; if otherwise, for the plaintiff. The jury found a verdict for the defendant. On a motion for a new trial, after the case had been, at the request of the court, twice argued, held, by Tindal, C. J., and Erle, J., that the publication was justifiable, and that the direction to the jury was right; per Coltman, J., and Cresswell, J., that the direction was wrong; the court being equally divided, the motion for a new trial was denied, and the defendant had judgment.[1] Where W. went to inquire of defendant the address of plaintiff, who had previously been a tenant of the defendants, in the course of a conversation which ensued, defendant spoke dispar-

[1] Coxhead *v.* Richards, 15 Law Jour. R. 278, C. P.; 10 Jur. 984; 2 C. B. 569. In our opinion, the Chief Justice and Justice Erle were right, and Justices Cresswell and Coltman wrong, and of the like opinion were the court in Davis *v.* Reeves, 5 Ir. L. Rep. N. S. 79. The importance of the principles involved justifies the reiteration of our conclusion that the material question in such a case is, Was the communication made *bona fide* to protect the interests of the person spoken to, without regard to its effect upon the party spoken of, and without any ill-will towards or desire to injure the person spoken of; if yea, it is privileged, and the absence or presence of a previous request is only material as evidence of the intent. This is conceded to be the law in the case of an employer giving what is termed a character to an ex-employé, and we shall show (§ 245) this latter act comes within the general rule of a communication made to protect the interests of the person to whom the communication is made. On the argument of Coxhead *v* Richards, 2 C. B. 591, Sir T. Wilde, for the plaintiff, says: "The cases as to characters of servants are not in point. Judges may have been wrong in supposing that a former master stands in a peculiar position. *It may be said that the servant authorizes the master to libel him*" (note, p. 421, *post*). But, right or wrong, the cases proceed upon that distinction. (Erle, J.: In those cases it is perfectly immaterial whether the party was a volunteer; the sole question is, whether the information was given honestly and *bona fide*. Cresswell, J.: Mr. Justice Bayley deals much more clearly with the principle upon which this class of cases proceeds than Lord Tenterden does, in Pattison *v.* Jones.) And at page 609, Erle, J., denies that the relation of master and servant is the material one in cases of privileged communication. The action of the defendant in the case now before us seems to be as consistent with a natural and praiseworthy impulse to protect the interest of the ship-owner, and to protect the lives of the persons committed to the plaintiff's care, as with a desire to injure the plaintiff, and should not be considered as by itself evidence of malice.

agingly of the plaintiff, and although W. told defendant he did not come to inquire into plaintiff's character, but only to obtain his address, defendant continued to speak concerning the plaintiff, and used words imputing that he was a swindler, but added that he spoke *in confidence*, in an action for these words alleging special damage, it was held proper to leave it to the jury to say whether defendant acted with malice or *bona fide* for the purpose of putting W. on his guard.[1] The defendant being tenant to A. of a house, B., the agent of A., directed the plaintiff to do some repairs at the house. The plaintiff did the repairs, but in a negligent manner, and during the progress of the work got drunk; circumstances occurred which induced the defendant to believe that the plaintiff had entered his (defendant's) cellar, and taken his cider deposited there. Two days afterwards, defendant met the plaintiff in the presence of D., and charged him with having got drunk and spoiled the work, and broken into his (defendant's) cellar. The defendant afterwards told D., in the absence of plaintiff, he was certain plaintiff had broken open the door. On the same day, the defendant complained to B. that plaintiff had been negligent with the work, had got drunk, and, as he thought, had broken open his cellar door. In an action of slander for these three several publications, held, that the first and third publications were conditionally privileged, and the second was not privileged.[2] Where the defendant, a son-in-law, addressed a letter to his mother-in-law, about to marry the plaintiff, containing slanderous imputations against him; held, that the occasion justified the writing, and that the jury were to say whether the defendant acted *bona fide*, and under *a belief of the truth*, although the imputations were false, and that such communications were to be regarded liberally, unless a clearly malicious

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[1] Picton *v.* Jackman, 4 C. & P. 257.

[2] Toogood *v.* Spyring, 1 Cr. M. & R. 181; 4 Tyrw. 582.

intention was manifest in the act.[1] That the defendant know of the falsity of the charge published, is a fact from which malice may be inferred.[2] A letter to a woman containing defamatory matter concerning her suitor, cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents.[3] So if one not having been inquired of, write to the family of a woman that the man she is about to marry has been imprisoned for larceny, the communication is not privileged.[4] But where the wife of A., prior to her decease, made a request to B., after her (A.'s) decease, to look to and advise her daughters. The wife of A. died, and he remarried. B. told the daughters of A.'s deceased wife that their step-mother was a loose woman, and that they ought to leave their home; this was held to be a privileged publication.[5] The plaintiffs, printers at M., had been employed by the defendant, the deputy clerk of the

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[1] Todd *v.* Hawkins, 8 C. & P. 88; 2 M. & Rob. 20. The court having instructed the jury "that confidential communications, made in the usual course of business, or of domestic or friendly intercourse, should be liberally viewed by juries," held that the charge was right. (Stallings *v.* Newman, 26 Ala. 300.) A grand jury had an indictment for theft of money before them, and a brother of the man who had lost the money, returning from the court, stated that fact in answer to inquiries made of him, and said that the general opinion was, that, if a certain person swore what he had stated, the accused would be convicted. This brother was afterwards sued for slandering the accused, by saying that "he believed he stole the money," and it appeared that the words laid in the declaration, if spoken at all of the plaintiff, were spoken in a private conversation with a brother of the defendant, both being brothers of the man whose money had been stolen, and were overheard by one who had been employed to listen. Held, that the occasion, and the relationship between the parties, afforded a *prima facie* justification, sufficient to defeat the action, in the absence of any other proof of malice than what arose from the mere speaking of the words. (Faris *v.* Starke, 9 Dana, 128.)

[2] Hartwell *v.* Vesey, 3 Law Times, N. S. 275. See *post*, § 389.

[3] Joannes *v.* Bennett, 5 Allen (Mass.), 169.

[4] Krebs *v.* Oliver, 12 Gray, 239. When A, a relative of defendant, was about to marry one C, the defendant wrote a letter to B, a sister-in-law of A, containing defamatory matter concerning C, and requesting B to repeat such matter to A, held privileged (Atkinson *v.* Congreve, 7 Ir. L. R. N. S. 109).

[5] Adcock *v.* Marsh, 8 Ired. 360.

peace for the county of K., to print the register of electors for the county, the expense of which was defrayed from the county rate, and allowed by the justices at quarter sessions; afterwards the defendant employed another printer, who agreed to do the work at a lower rate than that which the plaintiff required, and he wrote a letter to the "finance committee" appointed to superintend such expenses, in the conclusion of which he imputed improper motives to the plaintiffs in the demand which they made, and characterized their demand as "an attempt to obtain a considerable sum of money from the county by misrepresentation." In an action for libel, it was held that the occasion of writing the letter *prima facie* rebutted the presumption of malice, but that it was a question for the jury whether the sentence complained of as exceeding the privilege was evidence of malice.[1] The defendant, *bona fide* believing that the plaintiff, who was a clerk to one M., a customer of the defendant's, and who had been sent to the defendant's shop by M., had, while there, stolen a box from an inner room, went to M., and, after telling him of his loss, intimated his suspicion of the plaintiff, saying, "There was no one else in the room, and he must have taken it." Held, that the communication was privileged by the occasion.[2] A letter written to B., concerning the plaintiff, who was steward of B.'s estate, was held to be privileged.[3] A communication made by one subscriber to a charity to another subscriber to the same charity, respecting the conduct of the plaintiff, the medical attendant in the employ of such charity, held not to be privileged.[4]

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[1] Cooke *v.* Wildes, 5 El. & Bl. 328; 24 Law Jour. Rep. N. S. 367, Q. B.; 1 Jur. N. S. 610.

[2] Amann *v.* Damm, 8 C. B. N. S. 597.

[3] Cleaver *v.* Senaude, 1 Camp. 268*n*.

[4] Martin *v.* Strong, 5 Adol. & El. 535; 1 Nev. & P. 29. A letter written by the defendant, a subscriber to a charity, to the managing committee, impugning the moral character of the plaintiff, the secretary of said charity, in reference to a

Where the alleged libel was contained in a hand-bill offering a reward for the recovery of bills, and stating that the plaintiff was believed to have embezzled them; held, that if done with the view solely to protect persons liable on the bills, or for the conviction of the offender, it was a good defense, and that, in order to show the *bona fides* of the defendant, evidence of his having preferred a charge of the same nature against the plaintiff was admissible.[1] A communication by a landlord to his tenant, respecting the conduct of sub-tenants, or persons in the employ of the tenant, is conditionally privileged; as where the defendant complained to E., his tenant, that her lodgers, of whom the plaintiff was one, behaved improperly at the windows, and he added that no moral person would like to have such people in his house.[2] So communications made by an employer to his employee, or by an employee to his employer, are conditionally privileged in certain cases. Thus, defamatory words spoken by an employer to his overseer, intended to protect the employer's private interests and property, spoken without malice, were held privileged.[3] So where the plaintiff was a wine merchant, and the defendant the surgeon to a Poor Law Union. The plaintiff made a proposal to supply wine for the use of the sick paupers, defendant advised the Board of Guardians not to accept plaintiff's proposal, alleging that the wine which plaintiff would supply would not be

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person whom defendant had recommended as matron; and a second letter by the defendant to said committee, in answer to inquiries made by them, and also oral statements made by the defendant to said committee, were held to be privileged if made with an honest and reasonable belief of their truth. (Maitland *v.* Bramwell, 2 Fost. & F. 623; and see Lawles *v.* Anglo-Egyptian Cotton Co., Law Rep. IV, 262, Q. B.)

[1] Finden *v.* Westlake, 1 Mo. & Malk. 461.

[2] Knight *v.* Gibbs, 3 Nev. & M. 467; 1 Adol. & El. 43. Besides that the tenant was interested to know the character of her lodgers, the defendant was interested to maintain the reputation of his house.

[3] Easley *v.* Moss, 9 Ala. 266.

of the kind represented. Defendant's language was held privileged.[1] The communication of an agent to his principal, touching the business of his agency, and not going beyond it, is privileged, and is not actionable without proof that the defendant did not act honestly and in good faith, but intended to do a wanton injury to the plaintiff.[2] The defendants, bankers at L., received from C. & Co., of Y., for collection, a note drawn by plaintiffs, merchants at L.; the plaintiffs took up the note at maturity, the 19th of April, by giving a draft on defendant's bank, in which they kept their account. The draft overdrew the plaintiffs' account, but was accepted by a clerk of the defendant, who, in reply to an offer of one of the plaintiffs to transfer an amount standing to his individual credit sufficient to meet the check, declared that to be unnecessary. The plaintiffs' account was made good on the 25th of April, and on 28th of April defendants remitted to C. & Co. the amount of the note, and added a postscript: "Confidential. Had to hold over a few days for the accommodation of L. & H."—the plaintiffs. On the trial, there was no evidence as to malice; the plaintiffs had a verdict on which judgment was entered, and the case went to the Court of Appeals, where the judgment was reversed, and a new trial ordered; and the court said, "Assuming that the defendant made the communication in perfect good faith, as we must on this question of privilege, his act was not to be deemed officious, as it related to the very business with which he was intrusted."[3] The sheriff levied upon certain cattle of W., and they were wrongfully driven away, whereby he was likely to be damnified; he employed C., a law student, to ascertain the facts, and to advise what course it was best to pursue; held that C.'s letter to the

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[1] Murphy *v.* Kellet, 13 Ir. L. R. N. S. 488.

[2] Washburn *v.* Cooke, 3 Denio, 110.

[3] Lewis *v.* Chapman, 16 N. Y. 369; rev'g 19 Barb. 253.

sheriff, stating facts implicating W., and advising his arrest for larceny of the cattle, was privileged.[1]

§ 241*b*. The communication of a pastor to his parishioners, relating to matters not spiritual, is not necessarily privileged; as where the plaintiff, who had been for twenty years schoolmaster at the national school of the adjoining parishes of C. and I., of which the defendant, the rector of C., and another person, the vicar of I., were trustees, was requested by the defendant to undertake the Sunday-school of his parish; he declining to do so, was removed from the mastership of the national school; he afterwards, intending to gain a livelihood by it, set up a school in the defendant's parish, in a school-room used as a dissenting chapel. In a letter addressed to his parishioners, the defendant told them that the plaintiff's attempt betrayed a spirit of opposition to authority, and justified the managers of the national school in removing him; that "no rightly-disposed Christian, who received in simple faith the teaching of inspiration, 'Obey them who have the rule over you, and submit yourselves,' could expect God's blessing to rest upon such an undertaking," and warned them against countenancing it, either by subscriptions or sending their children to it for instruction; that it would be a schismatical school, and those who aided the plaintiff in any way would be partakers with him in his evil deeds; they were to mark them which cause divisions and offenses, and avoid them, &c. On the trial, the presiding judge held the communication a privileged one, and in the absence of any evidence of malice, ordered a verdict for the defendant; on motion for a new trial, this direction was held erroneous, and that the jury should have determined whether the publication was not malicious on its face.[2]

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[1] Washburn *v.* Cooke, 3 Denio, 110.

[2] Gilpin *v.* Fowler, 9 Ex. 615; 23 Law Jour. Rep. N. S. 152, Ex.; 18 Jur. 292.

§ 241*c*. A customer may in *good faith* complain to a tradesman with whom he deals of anything he may deem irregular or dishonest in the conduct of such tradesman towards him (the customer); as where the plaintiff, a butcher, sold meat to the defendant, and defendant afterwards called at plaintiff's shop, and, in the presence of several of his customers, said: "I intended to have dealt with you but shall not do so, for you changed the lamb that I bought of you for a coarse piece of mutton." Held that if the statement was made in good faith, it was privileged.[1] And where the defendant, a customer of the plaintiff, a corn-dealer, went to the place of business of the plaintiff, and using abusive language to plaintiff in a loud and angry tone of voice, said, among other things: I know all about you and your family, and you have robbed me ever since I have dealt with you. Held that the jury were to determine from the language used and from the tone and manner in which it was used, whether the defendant was merely in good faith making a complaint concerning a supposed wrong done him, and if so, it was privileged; that making the complaint in a loud voice, and in abusive terms, outside of the plaintiff's shop or in the presence of third parties, were circumstances from which the jury might infer malice; and if the statement was made maliciously, it was not privileged.[2]

§ 242. When once a confidential relation is established between two persons with regard to an inquiry of a private nature, whatever takes place between them relative to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection as well as what passed at the

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See § 399, *post*. There are in Scotland many reported cases of the recovery of damages against ministers of the Gospel, for words spoken in the pulpit. See 2 Shaw's Digest, 1613, tit. *Reparation*.

[1] Crisp *v.* Gill, 29 Law Times, 82.

[2] Oddy *v.* Paulet, 4 Fost. & F. 1009.

original interview; and it is a question for the jury whether any future communication on the same subject, though apparently casual and voluntary, did not take place under the influence of the confidential relation already established between the parties, and therefore entitled to the same protection.[1]

§ 243. Where a publication would be privileged if made, and because made to some certain person, the privilege may be forfeited by the publication being made to some other person; as where C. was employed, for compensation, by certain merchants in New York, in obtaining information concerning the business character and standing of their customers, and others in other States, doing business in New York. He wrote for their use, from the residence of T. & Co., a letter unfavorably representing them, and on his return had it and similar letters printed in a pamphlet, which he gave privately to his employers *and others*, some of whom had dealt with T. & Co. Held, that although the publication might have been privileged if made only to such of his employers as were interested in the pecuniary standing of T. & Co., the privilege was lost by the publication being made to other persons.[2] And so held of a circular letter sent by the secretary of a society for the protection of trade to the members of such society.[3] With regard to the report by the officers of a cor-

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[1] Beatson *v.* Skene, 5 Hurl. & N. 838. See *ante*, note 2, p. 386.

[2] Taylor *v.* Church, 1 E. D. Smith, 279; 8 N. Y. 452; Cook *v.* Hill, 3 Sandf. 341.

[3] Getting *v.* Foss, 3 Car. & P. 160. Where the defendant kept a mercantile agency whose business it was to obtain information respecting the credit and responsibility of persons in business, and to furnish the same to subscribers to his agency, it was held that a communication made in *good faith* to a subscriber to such agency, was privileged. "The business in which the defendant was engaged is sanctioned by the usages of commercial communities." (Ormsby *v.* Douglass, 37 N. Y. 477.) In Sherwood *v.* Gilbert (2 Albany Law Jour. 323) it was ruled at the circuit that the privilege accorded to a mercantile agency, as laid down in Ormsby *v.* Douglass, does not extend to the country correspondents of the agency. In Beardsley *v.* Tappan, 5 Blatch. C. C. 497, it was held that a communication by the proprietor of a mercantile agency, *through his clerks*, to his customers *and their clerks*, was not privileged. In that case

poration to the stockholders, of the result of their investigation into the conduct of their officers and agents, with their conclusions upon the evidence collected by them, it was held to be a privileged communication, but that the privilege extended only to making the report, and not to the preservation of it in the form of a book for distribution among the stockholders and in the community.[1] And where the defendant published an advertisement calling a meeting of the creditors of the plaintiff, and in addition defamatory remarks concerning the plaintiff, the publication was held not to be privileged, because the meeting of creditors might have been called in a less public manner.[2] Where the plaintiffs were contractors for the erection of a borough jail, and the defendants were members of the town council. The defendants, from their business, were competent judges of the work, and they published, in a local newspaper, a letter charging the plaintiff with omissions and deviations from their contract. In an action for libel, it was held that although the charges contained in the letter would have been privileged if made by the defendants to the town council, they were not privileged when published in a newspaper.[3] And although a bank director may be privileged at a meeting of the board to speak of the credit of a merchant or customer of his bank, he is not privileged so to speak, even to a co-director, in any other

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the plaintiff had a verdict for $10,000. A motion for a new trial was made before Justice Nelson, and denied. The defendant appealed to the United States Supreme Court, where the judgment was, December, 1870, reversed on a collateral point.

In the defendant's brief in Tappan *v.* Beardsley, it was said that only thirteen suits and one prosecution against mercantile agencies for libel had been instituted up to that time, A. D. 1870, and of these, the prosecution and two suits were then pending, and the residue of the suits were either abandoned or had resulted in favor of the defendants. Billings *v.* Russell, 8 Boston Law Rep. N. S. 699 (A. D. 1851), was the first reported case for libel against a mercantile agency.

[1] Phil. & R. R. Co. *v.* Quigley, 21 How. U. S. Rep. 202. See Koenig *v.* Ritchie, 3 Fost. & F. 413.

[2] Brown *v.* Croome, 2 Stark. Cas. 297.

[3] Simpson *v.* Downs, 16 Law Times, N. S. 391.

place or at any other time than at such meeting during its session.[1] The publication, by the directors of an incorporated society for promoting female medical education, in their annual report, of a "caution to the public" against trusting a person who had formerly been employed to obtain and collect subscriptions in their behalf, but had since been dismissed, was held to be justified so far only as it was made in good faith, and was required to protect the corporation and the public against false representations of that person; and that the questions, whether the directors had acted in good faith, and had not exceeded their privilege, were for the jury.[2] The plaintiff, having the defendant's bond, advertised it for sale; the defendant published a statement of the circumstances under which the bond had been given, with this conclusion: "His (plaintiff's) object is either to extract money from the pockets of an unwary purchaser, or, what is more likely, to extort money from me;" held not privileged.[3] A. understanding that B. imputed to C., a relative of A.'s, the passing to him of a piece of forged paper, told B., untruly, that he was authorized by C. to call upon him and investigate the matter, and B. thereupon repeatedly asserted C.'s guilt of the crime; held, that these assertions were unnecessary and useless, and were not privileged, and it seems they would not have been privileged if A. had been C.'s agent to call upon B. for information.[4]

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[1] Sewell *v.* Catlin, 3 Wend. 291.

[2] Gassett *v.* Gilbert, 6 Gray (Mass.) 94.

[3] Robertson *v.* McDougall, 4 Bing. 670; 1 Mo. & P. 692; 3 Car. & P. 259.

[4] Thorn *v.* Moser, 1 Denio, 488. The defendant had suspected, and declared his suspicion, that a person's wife had committed larceny; but upon being inquired of by that person, whether his suspicions continued, replied that he was now satisfied that A. B. (a hired maid) stole it. Held that if the communication was privileged at all, the defamatory matter, going further than to satisfy the inquirer that there was reason for the suspicion to cease, went beyond the exigency of the occasion. (Robinett *v.* Ruby, 13 Md. 95.) A. on an occasion when no third person was present, accused

§ 244. There are, however, some cases where the publication to others than those immediately interested or concerned does not forfeit the privilege; as where the plaintiff, a female, went to the store of the defendant to make a purchase, and after she left, the shopman, missing a roll of ribbon, supposed she had taken it, and so informed his employer, the defendant; the following day the plaintiff was passing the defendant's store; the defendant seeing her, called her in, and taxed her with the theft, which the plaintiff denying, the defendant detained her and sent for her father, and in his presence charged the plaintiff with stealing the ribbon; after some altercation the plaintiff was permitted to depart, and afterwards brought an action for slander, in which action it was held at *nisi prius* that the repetition of the charge to the plaintiff's father was, under the circumstances, a privileged publication.[1] And where, in an action for slander, it appeared that the defendant, in the presence of a third person, not an officer of

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B. of stealing; afterwards a friend of B.'s called on A. and asked him if he had made such an accusation? A. answered "Yes, and I believe it to be true." Held not privileged (Force *v.* Warren, 15 Com. B. N. S. 806; and see Smith *v.* Matthews, 1 Moo. & Rob. 151; Griffith *v.* Lewis, 7 Q. B. 61; 14 Law Jour. 197 Q. B.) Where the plaintiff, a carpenter, was employed by a builder, and defendant imputed that plaintiff had, while so employed at one Burton's house, carried away some quarterings, the builder afterwards went to defendant and asked him did he say so? to which defendant replied, "Yes, I saw the man employed by you take from Burton's house two long pieces of quartering." Held proper to instruct the jury that the words were privileged unless spoken maliciously. (Kine *v.* Sewell, 3 M. & W. 297.) If one merely acknowledges to having made a statement concerning the plaintiff, such acknowledgment alone will not sustain an action, but it may be used as evidence of such former statement.

[1] Fowler *v.* Homer, 3 Camp. 294, and *ante* note 2, p. 392; also Toogood *v.* Spyring, 1 Cr. M. & R. 181; 4 Tyrw. 582; Manby *v.* Witb. 18 C. B. 544; Taylor *v.* Hawkins, 16 Q. B. 308. Words spoken by the defendant, which relate to a subject-matter in which he is immediately interested, and are said for the purpose of protecting his own interest and in the full belief that they are true, are privileged communications, though made in the presence of others than the parties immediately interested; and it is incumbent on the plaintiff to show malice, in fact, in order to recover. (Brow *v.* Hathaway, 13 Allen (Mass.) 239; see Sneed *v.* Davis, Law Rep. V, Q. B. 608.)

justice, charged the plaintiff with having stolen his property, and afterward repeated the charge to another person, also not an officer, who was, with the consent of the plaintiff, called in to search him, held the charge was privileged if the defendant believed in its truth, acted *bona fide*, and did not make the charge before more persons or in stronger language than was necessary.[1]

§ 244*a*. When words imputing misconduct of which two persons are alleged to have been jointly guilty, are spoken to one of them under circumstances which made the communication privileged as to him, the statement is privileged as to the other also, and the latter cannot maintain an action in respect of such statement; thus where it appeared that one Sneed, the plaintiff, was an attorney and the legal adviser of the Rev. H. H., who was trustee for one widow D. and her children, and also rector of the parish in which defendant resided. During a visit H. H. paid to defendant, in the course of conversation and in the presence of other persons than H. H. and defendant, the defendant stated to H. H., "Your name is pretty well up in the town of Brecon. You and your scoundrel solicitor's names are ringing through the shops and streets of Brecon. You are spoken of as robbing the widow and orphans—you to build your church and he to marry his daughter." In an action by Snead, the court charged the jury that if there was express malice the action would lie, otherwise they might consider the communication privileged, provided that they were of opinion that the defendant was *bona fide* telling H. H. facts important for him to know, in

[1] Padmore *v.* Lawrence, 11 Ad. & El. 380; 3 Per. & D. 209. The plaintiff was the matron of a charitable institution; a charge being made against her, the defendant, the secretary of the institution, was appointed to investigate the truth of such charges. In the course of such investigation, the defendant, in the presence of third parties, inmates of the institution, made defamatory statements concerning the plaintiff. Held to be conditionally privileged (Wallace *v.* Carroll, 11 Ir. L. R. N. S. 485).

order to clear his character. The jury negatived malice. A verdict was entered for plaintiff, with liberty to move to enter it for defendant. The court in banc held that, as the statement referred to both plaintiff and H. H. in such a manner as to be indivisible, and the part relating to H. H. could not be repeated to him without including the part affecting the plaintiff, the jury having negatived malice, the statement was privileged, and the verdict was ordered for the defendant.[1]

§ 245. There is a well recognized right to what is termed "give a character to a servant." This right may be thus described: An ex-employer may, without rendering himself liable in an action for slander or libel, in *good faith*, state orally or in writing, and as well without as with a previous request, all that he may *believe* to be true concerning his ex-employee. It appearing that the publication was made in what is termed "giving a character," the presumption is that it is made *bona fide*, and the burden is upon the plaintiff to show *malice* in the publisher, *i. e.*, either that he had an intent to injure the person spoken of, or that he did not believe in the truth of the statement published. Where no intent to injure exists, a belief in the truth of the language published is a legal excuse for making the publication; but where an intent to injure exists, a belief in the truth of the language published is not a legal excuse for making the publication. *Malice*, or a want of *good faith*, is established when it is shown that the matter published was false within the knowledge of the publisher; or malice may be established by showing a bad motive in making the publication; as that it was made more publicly than was necessary to protect the interests of the parties concerned, or that it contained

[1] Davies *v.* Snead, Law Rep. V, Q. B. 608; and see Brow *v.* Hathaway, 13 Allen (Mass.), 239.

matter not relevant to the occasion, or that the publisher entertained ill-will toward the person whom the publication concerned. Although the right now under consideration is one exercised in connection with the relation of master and servant, it does not, at least in the manner generally supposed, arise out of that relation, nor is the right restricted within the limits ordinarily assigned to it. The relation of master and servant, or of employer and employee, is one created by contract; with the determination of the contract the relation expires, and at the expiration of the relation ceases all the rights and duties which, during its continuance, existed between the parties. Thenceforth the parties occupy the same relative positions as if no contract of hiring and serving had ever been made. It cannot be that because A. has been in B.'s employ, B. thereby acquires a right to publish concerning A. anything he would not have been permitted with impunity to publish had such relation never existed. Hence the right now in review must rest on some other foundation, or arise in some other way, than out of the mere fact that the person spoken or written of has been in the employ of the publisher.[1] On examination, it will be perceived that this right of an *ex employer* to give, as it is termed, a character to his *ex-employee*, is nothing more than a consequence of the right to communicate one's belief, which is referred to and illustrated in a preceding section (§ 241). An employer is charged with the duty of exercising due care in the selection and retention of properly qualified employees or agents, and is liable for

[1] That seems a monstrous proposition of Sir T. Wilde's in the argument of Coxhead *v.* Richards (see *ante*, note, p. 407), that "the servant authorizes the master to libel him," and yet perhaps it is warranted by the reasoning in many decisions, and it is the only assumption for basing a distinction between the case of an ex-employer speaking of his ex-employee and the case of any other person (one not an employer) making a communication to a party interested.

all the acts of his employees done in his service.[1] In addition, the employer has more or less to trust the safety of his person and his property to the employee; the employer, therefore, is peculiarly interested to know the character and capacity of every person who either is already in his employ, or is desirous of entering his employ. The employer can obtain this knowledge only from the employee himself, or from information furnished by those to whom the employee may be known. To limit the source of this knowledge to the employee himself, would manifestly, in the majority of cases, operate to prevent the obtaining any information worth the having; but because the employer is interested in knowing the character and capacity of those in his employ, or who are candidates for employment by him, not a former employer only, but every one who honestly believes himself possessed of knowledge on the subject which the employer is interested to know, may, with or without a previous request, in good faith, communicate such his belief to the employer. In such cases, the communication is made not to promote the interest of the person making it, but either to serve the interests of the employer, or to injure the employee. No one is under any obligation to make such a communication; he does not owe it as a duty, either to the employer or the employee, to make any communication on the subject. Making the communication is the exercise of a right, and is optional (§ 39). This right is exercised under the double peril that by speaking disparagingly of the employee, the speaker may be sued by the employee for slander, and by speaking approvingly of the employee he may be sued by the employer for misrepresentation.[2]

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[1] This does not mean *while* in the employer's service, but done in the execution of his proper duties as such employee. (See *ante*, note p. 156.)

[2] Defendant's letter of recommendation of the plaintiff, if untrue, would have ren-

Hence usually this right is exercised with reluctance; and as, where the communication is made without request, less evidence of ill-will may be required than in the case of a communication made upon a request,[1] it seldom happens that such communications are made without request; and because the character and capacity of an employee will be by no one so well known as by the one in whose service he has been, it happens the ex-employer is the person to whom, in the majority of instances, application will be made for information respecting the character and capacity of a candidate for employment, not because the ex-employer is the only person having the right to give information, but because he is supposed to be better qualified than any other to give information on the subject. The exercise of this right should be encouraged, not only for the benefit of the employer, but of the employee; if the ex-employer refuses, as he lawfully may,[2] to answer any inquiries respecting his ex-employee, the probable inference is that he can say nothing favorable, and will not incur the risk of saying anything unfavorable—an inference which may be unjust to the ex-employee. These views have been expressed judicially, as thus: "But the rule is general, and it seems to me to be quite a mistake to suppose that it is the privilege only of persons giving characters. There are two other classes of persons materially interested in the maintenance of the privilege—the persons accepting characters, and those of whom characters are given. It is a most important privilege for the encouragement of all

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dered him liable to any one injured thereby. (Fowles *v.* Bowen, 30 N. Y. 20; and see Pasley *v.* Freeman, 3 Term R. 51.)

[1] "At all events, when he volunteers to give the character, stronger evidence will be required that he acted *bona fide*, than in the case where he has given the character after being required so to do." (Littledale, J., Pattison *v.* Jones, 8 Barn. & C. 578.)

[2] No action lies for refusing to give information as to the character or capacity of a former employee. (Carrol *v.* Bird, 3 Esp. 204.)

honest servants. They are sufficiently protected against the abuse of it by that limitation of it to which all agree—that if a master, going beyond it, wantonly and maliciously makes a false statement as to the character of his servant, the express malice takes away all the privilege."[1]

§ 246. The subject of the preceding section (§ 245) is illustrated by the decisions to which we proceed to refer. Thus, it is said,[2] a *bona fide* character given of a servant that she was saucy, &c., if there be no malice (which must be directly proved), will not ground an action of slander, though the servant was prevented from getting a place thereby; and, though a letter giving a false character of a servant may be the ground of an action, yet, if written as an answer to a letter sent, not with a view to obtaining a character, but with an intention of obtaining such an answer as should be the ground of an action, no action can be sustained.[3] A servant cannot maintain an action against his former master for words spoken or a letter written by him in giving a character of the servant, unless the latter prove the malice as well as falsehood of the charge, even though the master make specific charges of fraud. As where the plaintiff, who had been in the employ of the defendant, afterwards applied to one R. for employment. R. inquired of the defendant concerning plaintiff, and in consequence of what was told him by defendant, refused to employ plaintiff. Upon this, C., plaintiff's brother-in-law, called upon the defendant for an explanation, and then the defendant wrote C., "Two days I gave him (plaintiff) money to go into the city and buy

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[1] Wightman, J., Gardner *v.* Slade, 13 Jurist, 828; 13 Adol. & El. N. S. 796; and see in note, p. 427, *post*, and Swadling *v.* Tarpley, in *Appendix, post.*

[2] Edmonson *v.* Stephenson, Bull. N. P. 8.

[3] King *v.* Waring, 5 Esp. 14.

books. When he came home I desired him to reckon up his accounts; he did so. But being one day more curious than I sometimes was, I looked over his account, article by article, and in one book I well knew the price of, I found he had charged me one shilling more than it cost, and that shilling he kept in his pocket," with statements of other frauds; on the trial the plaintiff had a verdict, subject to the opinion of the court on a special case; upon the argument of the case judgment was ordered for the defendant.[1] Where, in an action of slander, it appeared that the plaintiff had applied to the under-sheriff to be appointed an officer, the latter applied to the defendant as to the fitness of plaintiff, held that the answer of the defendant was conditionally privileged.[2] Where A. introduced the plaintiff to defendant, a ship's captain, who employed plaintiff as his mate, defendant afterwards dismissed plaintiff from his service, and wrote A. that he had done so on account of the intemperate habits of the plaintiff, this was held a privileged communication.[3] The defendant being about to dismiss the plaintiff from his employ, called in a friend to hear what passed, and having dismissed the plaintiff, refused to give him a character, alleging to those who applied for information respecting the plaintiff, that he, defendant, had discharged the plaintiff for dishonesty. The plaintiff's brother afterwards inquired of the defendant why he had treated the plaintiff in such a manner, and that he (defendant) was keeping plaintiff out of employ. The defendant answered, "He has robbed me; and I believe for years past," adding that

[1] Weatherstone *v.* Hawkins, 1 Term R. 110.

[2] Sims *v.* Kinder, 1 Carr. 279.

[3] Tremaine *v.* Parker, 12 Law Times, 312. A letter addressed to a person on whose recommendation the writer had taken the plaintiff into his service, to the effect that his (plaintiff's) conduct had not justified the character given of him, and that he had left a balance unaccounted for, and that he ought not to be recommended for morality or honesty; this was held to be privileged. (Dixon *v.* Parsons, I Fost. & Fin. 24.)

he concluded so from the circumstances under which he had discharged the plaintiff. Erle, J., said, "The calling in a witness was consistent with a wish to spread defamation; it was consistent also with the wish to do what a prudent man would desire to do. But if the effect of the evidence is equal both ways, the onus of proving malice lies upon the plaintiff. As to the words spoken to the plaintiff's brother, no malicious motive appears. The evidence, indeed, related to only one robbery, whereas the defendant spoke of having been robbed for years. But the communication was made in answer to an inquiry by the plaintiff's brother, and there are no circumstances to show that the extent of the statement actually made proceeded from malice, or went beyond what might be said by a person honestly wishing to tell the whole truth."[1] The plaintiff had been in the employ of the defendant and dismissed on a charge of theft. Plaintiff afterwards went to defendant's house to be paid his wages, and was in conversation with the defendant's servants, when the defendant, addressing his servants, said, "I discharged that man (the plaintiff) for robbing me; do not speak any more to him, in public or private, or I shall think you as bad as him." Maule, J., said, "The evidence does not raise any probability of malice, and is quite as consistent with its absence as with its presence; and considering that the mere possibility of malice which is found in this case, and in all cases where it is not disproved would not be sufficient to justify a finding for the plaintiff, and it was right not to leave the question of malice to the jury."[2] A defendant who had dismissed two servants, told one in the absence of the other, You have both been robbing me; it was held conditionally privileged.[3]

[1] Taylor *v.* Hawkins, 16 Q. B. 308; 20 Law Jour. Rep. N. S. 313, Q. B.; 15 Jurist, 706; and *ante*, § 244.

[2] Somerville *v.* Hawkins, 10 C. B. 583; 15 Jurist, 450.

[3] Manby *v.* Witt, and Eastmead *v.* Witt, 18 C. B. 544; 25 Law Jour. 294, C. P.

The plaintiff being in the service of the defendant was discharged without any previous notice, and the plaintiff considering himself entitled to a month's wages, in lieu of notice, refused to quit the defendant's house until those wages were paid him, whereupon the defendant had the plaintiff removed by a police officer. The defendant called on one Holland, in whose employ the plaintiff had previously been, and complained of plaintiff, requesting Mr. Holland not to give plaintiff another character. Subsequently, the plaintiff applied to Mr. Hand for employment, who inquired of defendant and received from him a letter, the material portion of which was as thus: "Rogers (the plaintiff) did not live with me six months, as he has told you, and I wish I had never taken him into my house, as he is a bad-tempered, lazy, impertinent fellow, and has given me a great deal of trouble. I was obliged to send for a police officer to put him and his things out of my house; as I look upon it he will take any advantage he can." On the trial the court left it to the jury to say if the defendant had acted maliciously; the verdict was for the plaintiff: leave was reserved to the defendant to move to enter a non-suit. He moved, but his motion was refused.[1] Where defendant, plaintiff's former mistress, in a

[1] Rogers *v.* Clifton, 3 B. & P. 587, on the motion for a non-suit, Lord Alvanley, Ch. J., said, "If it were to be understood that whenever a master gives a bad character to a servant who has quitted his service, he may be forced by the servant, in justification, to prove the truth of what he has stated, it would be impossible for any master (so understanding the law, at least with any regard to his own safety) to give any character but the most favorable to a servant, *and consequently impossible for a servant not entitled to the most favorable character, to obtain any new place.* Unquestionably the master is not bound to substantiate the truth of what he says in giving a character to his late servant, but it is equally clear that the servant may, if he can prove the character to be false, and the question between the master and servant will always, in such a case, be, whether what the former has spoken concerning the latter be malicious and defamatory;" and per Rooke, J., "a master may, at any time, *whether asked or not,* speak of the character of his servant, provided that he speak in the honesty of his heart, and an action cannot be maintained against him for so doing; at the same time, masters are not warranted in speaking ill of their servants from heat and passion." Where the plaintiff charged his servant with robbing him, and the robbery charged consisted in giving away pieces of bread, the court charged the

letter answering inquiries as to plaintiff's character, stated acts of misconduct during the time of plaintiff's being in her service, and also *subsequently* to her having left it, and defendant had also stated the same to the persons who originally recommended plaintiff to her; held, that the latter part of the letter was a privileged communication, and which the defendant was bound to make, and that the oral statement having been made only to the persons who recommended plaintiff, was not officious nor evidence of malice, which in such an action is the gist, and must be expressly proved.[1] In an action for slander of the plaintiff, in her character of a domestic servant, the plaintiff proved that, having lived some time with the defendant, she changed service upon a character given to her by the defendant; that, some time afterwards, the defendant's wife, in a letter to her new mistress, alluded to the plaintiff, and to the character first given of her as being unmerited; that thereupon the new mistress requested further information, and was told by the defendant's wife that she had discovered, since the time of the giving of the first character, that the plaintiff was dishonest. Held, that there was no evidence to be submitted to the jury of malice in the defendant's wife, and that the communication was privileged. If a servant obtain a place upon the strength of a character given by his master, and the master afterwards discover circumstances which induce him to believe that the character was undeserved, he is morally bound to inform the new master of those circumstances, and the communication made concerning them is a privileged communication.[2] The plaintiff had been in

jury that if the pieces of bread given away were such pieces as the servant might reasonably suppose the master would not object to his giving away, the master was not justified in the charge of robbery, and the servant might recover. (Roberts *v.* Richards, 3 Fost. & Fin. 507.)

[1] Child *v.* Affleck, 9 B. & C. 403.

[2] Gardner *v.* Slade, 13 Jurist, 826; 11 Law Jour. Rep. 334, Q. B.; 13 Law Times, 282.

the employ of defendant and his partners; on plaintiff leaving their employ, defendant and his partners gave him a written recommendation, and plaintiff afterwards went into the employ of C. Subsequently, defendant saw C., and said he desired to set him right in regard to a young man (the plaintiff) in his employ, that he was a liar, and he had doubts of his honesty; held a conditionally privileged communication.[1] The letter of recommendation, if untrue, would have rendered him liable to any one injured thereby, and he was privileged to say what he did for his own protection. Plaintiff was in the service of the defendants (husband and wife) as governess for fourteen months. After she left she sought an engagement elsewhere, and on an inquiry being made to the defendant (the wife) concerning the plaintiff, the defendant answered in writing, "I parted with her (the plaintiff) on account of her incompetency and not being lady-like nor good tempered," adding, "May I trouble you to tell her (the plaintiff) that this being the third time I have been referred to, I beg to decline any further applications." Evidence was given of plaintiff's competency and of her being lady-like and good tempered. It was left to the jury to say whether the letter was written maliciously, and that stating what was untrue was evidence of malice. The plaintiff had a verdict, and the court above refused to disturb it.[2] Where the plaintiff's master (the defendant) had, on his quitting his service, and being about to enter on another, written of his own accord a letter informing the party that he had discharged the plaintiff for misconduct, and on receiving a letter inquiring the particulars, had written the libellous letters for which the action was brought; held, that although *a party might set himself in motion to induce inquiries by a third party*, and the answers, although slan-

[1] Fowles *v.* Bowen, 30 N. Y. 20.

[2] Fountain *v.* Boodle, 3 Ad. & El. N. S. 5; 2 Gale & Dav. 455.

derous, might come within the scope of a privileged communication; yet in such a case it would be a question for the jury to say if the defendant acted *bona fide*, or maliciously intending to do the servant an injury.[1] A. (plaintiff) having left B.'s (defendant's) service at her own desire, in consequence of B.'s accusing her of dishonesty, returned to B.'s house for her boxes and B. then charged her with theft and told her that if she had not come back he would have said nothing about it; upon A.'s informing B. that C. intended coming to him for her (A.'s) character, defendant said he should give A. no character unless she confessed to the alleged theft. C. went to defendant for A.'s character; defendant told C. that A. was dishonest. In an action for slander, held, that the occasion was privileged, but that the statement of defendant to plaintiff was evidence from which malice might be inferred, and that the judge upon the trial did right to leave the question of malice to the jury and in asking them the question whether defendant believed his imputation to be true.[2] The plaintiff was defendant's gardener. The defendant having dismissed plaintiff from his service, wrote E., on whose recommendation defendant had originally engaged plaintiff, stating *inter alia*, "On Saturday I had another scene with F. (plaintiff) in my garden. He was extremely violent, came towards me several times with an open clasp knife in his hand and his eyes starting from their sockets with rage, a perfect raving madman. I was fortunately accompanied by my upper servant. He accused me of having opened a letter of his. * * * I think it right you should be informed of F.'s (plaintiff's) violent conduct as you might unwittingly recommend him without being aware of his temper and faults." E. who was the superintendent of the Royal Horticultural Society, of which defendant was a member,

[1] Pattison *v.* Jones, 8 B. & C. 587; 3 C. & P. 383; 3 M. & R. 101.

[2] Jackson *v.* Hopperton, 10 Law Times, N. S. 529.

was in the habit of recommending gardeners to the members of the society, and plaintff had, as defendant knew at the time he wrote the letter, applied to E. to procure him another situation; held, that the letter could not be considered as privileged, as there were expressions in it, such as plaintiff's being a "raving madman," which went beyond what was justifiable, although the jury found the communication was made *bona fide* and without malice.[1]

§ 247. As respects publications concerning candidates for *office*, we take upon ourselves, with due deference to the decisions, to say, that the same rule applies to them as to communications made concerning candidates for employment generally (§ 245). The rule, as we suppose, must be the same for every *kind* of employment, and *office* is only another name for *employment*. The right which one has to speak concerning a candidate for employment as a mechanic or domestic, is neither more extensive nor more limited than the right one has to speak of a candidate for the office of a legislator or a judge. As respects a candidate for employment generally, so with respect to a candidate for office; the publication, to be privileged, must, with certain exceptions (§ 244), be limited to the persons interested. A general publication, as well to those interested as to those not interested, would not be privileged. Again, the matter published must be such as is relevant to the subject-matter, and necessary to be known by the persons in interest for their own protection. Thus the publication in a newspaper of defamatory matter concerning a candidate for appointment, was held not to be privileged, and that to have been privileged the publication should have been limited to the appointing

[1] Fryer *v.* Kinnersley, 15 C. B. N. S. 429; 33 Law Jour. 96, C. P. In Cowles *v.* Potts, 34 Law Jour. 248, Q. B. by counsel: It is difficult to understand the case of Fryer *v.* Kinnersley, and by Blackburn, J.: I do not quite understand the *ratio decidendi* of that case.

power (§ 243);[1] so limited it would have been privileged; as where defendant, at the request of a senator of the United States, in order to give him information as to the fitness of the plaintiff for the office to which he was nominated, spoke the words charged in the declaration, and referred to the records of a court for their confirmation, it was held that there was nothing from which to imply malice, and that the plaintiff could not sustain his action.[2] Where a candidate for the representation of a borough circulated an address to the electors, asking for their suffrages, and claiming to be a fit and proper person to represent them in Parliament, and an elector in that borough published *in a newspaper* two letters addressed to the candidate, the first in answer to the circular, and the second in consequence of the treatment he had received from the candidate on the day of nomination at the hustings, and both letters contained imputations on the private character of the candidate; on the trial of an action for libel, the judge charged the jury that the occasion did not justify the publication, and the plaintiff had a verdict. On a motion for a new trial, it was claimed that it was justifiable for an elector *bona fide* to communicate to the constituency any matter respecting a candidate which the elector believed to be true and material to the election. *The principle was conceded by the court to be correct, but was held inapplicable because the communication had not been confined to the constituency of the plaintiff, but had been published in a newspaper.*[3] Where the plaintiff was a candidate at a general election for re-election as State

[1] Hunt *v.* Bennett, 19 N. Y. 173, affirming 4 E. D. Smith, 647.

[2] Law *v.* Scott, 5 Har. & J. 438. A statute in Pennsylvania provides: No person shall be subject to prosecution by indictment for investigating official conduct of public officers, &c.

[3] Duncombe *v.* Daniell, 8 C. & P. 213; 1 W. W. & H. 101, Denman, C. J. However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to *all the world* of facts injurious to a person who happens to stand in the situation of a candidate.

Governor, the defendant published defamatory matter of the plaintiff in "An address to the electors of the State of New York;" in an action of libel for this publication, it was contended on the part of the defendant that the plaintiff could not recover unless upon proof of "*express malice.*" The court denied this position, and held that malice was to be implied from the falsity of the publication.[1] In an action of slander, laying special damage, it appeared that plaintiff, a trustee of a charity, asked C., by whom he was employed as bailiff, to obtain signatures to a protest against his (plaintiff's) removal from his office of trustee. C. asked defendant for his signature, defendant refused, and on being pressed for his reasons for refusing, said that he would not keep a big rogue like plaintiff in the trust, and he explained the reasons for this opinion, which were that plaintiff had left the parish under discreditable circumstances and without settling with his creditors, including the defendant. He also added he was surprised C. employed such a man. In consequence of this statement, C. dismissed plaintiff from his employ. The jury found that defendant had not acted with malice, held that the words were privileged,

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[1] Lewis *v.* Few, 5 Johns. 1. In Harwood *v.* Astley, 4 Bos. & Pul. 47; 1 N. R. 47, an action for slander of a candidate for election to Parliament, the plaintiff succeeded and had judgment, which the court, on writ of error, affirmed principally, if not solely, on the ground that the jury must have found the publication to be *malicious*, and therefore, not privileged. Officers and candidates for offices may be canvassed, but not calumniated. (Seely *v.* Blair, Wright, 358, 683. See Brewer *v.* Weakley, 2 Overt. 99; Root *v.* King, 7 Cow. 613, affirmed 4 Wend. 113, note 1 Stark. Slan. 301.) In Mayrant *v.* Richardson, 1 Nott. & McC. 327, an action of slander against a candidate for office, it was held by Nott, J., that when a man becomes a candidate for public honors, he makes profert of himself for public investigation. No one has the right to impute to him infamous crimes or misdemeanors, but talents and qualifications are mere matters of opinion, of which the electors are the only judges, and in that case it was held that imputing weakness of understanding to a candidate for Congress was not actionable. In Com'wealth *v.* Clapp, 4 Mass. 163, Parsons, C. J., says: "When a man shall consent to be a candidate for a public office, conferred by the electors of the people, he must be considered as putting his character in issue, so far as may respect his fitness and qualifications for office." But see Curtis *v.* Mussey, 6 Gray, 261; Aldrich *v.* Press Print. Co., 9 Min. 133.

and verdict entered for defendant.[1] And where the plaintiff was a candidate for re-election as overseer. At a meeting to elect overseers, the defendant charged the plaintiff with having, while in office as overseer, misappropriated the parish funds, held that unless this statement was a malicious abuse of the occasion, it was privileged.[2]

§ 248. Insanity is a complete defense to an action for slander or libel.[3] Fools and madmen are tacitly excepted out of all laws.[4] And Coke said: A madman is only punished by his madness. A judgment in an action for slander was perpetually enjoined, upon the ground that at the time of the speaking the words, and of the rendition of the judgment, the defendant was insane in reference to the subject of the slander.[5]

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[1] Cowles *v.* Potts, 34 Law Jour. 247, Q. B.

[2] George *v.* Goddard, 2 Fost. & F. 689.

[3] Bryant *v.* Jackson, 6 Humpf. 199; Yeates *v.* Reed, 4 Blackf. 463; Dickinson *v.* Barber, 9 Mass. 225. Perhaps delirium tremens is a defense; for it is a species of insanity, and like insanity from other causes, affects the responsibility for crime. (Maconnehey *v.* The State, 5 Ohio, N. S. 77; O'Brien *v.* The People, 48 Barb. 275.) A lunatic is liable for a trespass. (Weaver *v.* Ward, Hob. 134; Krom *v.* Schoonmaker, 3 Barb. 647; Bullock *v.* Babcock, 3 Wend. 391; Rae's Medical Juris. 110; Mason *v.* Keeling, 12 Mod. 332; 2 Monthly Law Reporter, N. S. 487.) In the chapter in the Roman Law, entitled "*Si quis Imperatori Maledixerit*," is a passage, which being interpreted, reads: "If the evil speaking proceed from levity, it is to be despised; if from madness, it is to be pitied; if from a sense of wrong, it is to be forgiven."

It is not a defense to an action of slander or libel, that the words were not spoken in earnest, but as a jest, and that the defendant did not expect to be believed. (Hatch *v.* Potter, 2 Gilman, 725; Holt on Libel, 290, 291; Long *v.* Eakle, 4 Md. 454; McKee *v.* Ingalls, 4 Scam. 30; Wood's Civil Law, 247; and see Pieter Tonneman *v.* Jan de Witt, Valentine's Corporation Manual for 1849, p. 402; Addison on Contracts, 261.) Among the Percy Anecdotes, Division, "The Bar," is an anecdote of a suit for slander brought by Serjeant Maynard, entitled "Golden Pippins and Pig," and in which it is stated the serjeant had a verdict in his favor, but judgment was arrested in consequence of the words complained against," being the burden of an old story which had been applied to the serjeant in *jest*, and without any intention to slander." In Campbell's Lives of the Lord Chancellors, V, ch. civ, p. 31, this anecdote is related more circumstantially. See Donoghue *v.* Hayes, Hayes' Ir. Ex. R. 265.

[4] Holt, Ch. J., City of London *v.* Vanacker, Carthew, 483. "There is no slander in an allowed fool." (Twelfth Night, act 1, sc. v.)

[5] Horner *v.* Marshall, 5 Munf. 466.

§ 249. Drunkenness is not a defense to an action for slander or libel,[1] nor is infancy,[2] but drunkenness may, perhaps, be a matter of mitigation.[3]

§ 250. It is a good defense to an action for libel, that after the publication the plaintiff agreed with the defendant to accept the publication of an apology in full for his cause of action, and that such apology had been published.[4] And it seems that an agreement that the slanderer should write a letter to a third party, exculpating the person slandered from the charge, is satisfaction of the injury, and his so doing is evidence of an accord and satisfaction.[5] Formerly a defense of accord and satisfaction

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[1] McKee *v.* Ingalls, 4 Scam. 30; Reid *v.* Harper, 25 Iowa, 87. As to defense of intoxication in an action on an express contract, see Gore *v.* Gibson, 13 M. & W. 623.

[2] Defries *v.* Davis, 1 Bing. N. C. 692; 1 Scott, 594. An infant two years old is not liable *criminaliter* for a nuisance erected on his lands. (The People *v.* Townsend, 3 Hill, 479.) And one aged only eleven years, seized of lands in the usual occupation of his guardian in socage, is not indictable for the non-repair of a bridge *ratione tenure.* (Rex *v.* Sutton, 5 Nev. & Man. 353.) See cases collected in a note in 5 Monthly Law Reporter, N. S. 364, Boston, Nov. 1852.

[3] Howell *v.* Howell, 10 Ired. 84. And see Isley *v.* Lovejoy, 8 Blackf. 462; Gates *v.* Meredith, 7 Ind. 440.

[4] Boosey *v.* Wood, 3 Hurl. & Colt. 484. An agreement not to bring any action in consideration of the defendant's destroying certain documents relating to the charge imputed to the plaintiff, which the defendant accordingly destroyed, held to be accord and satisfaction. (Lane *v.* Applegate, 1 Starkie, 97.) Where, in an action of slander, an agreement had been made, in consequence of which the defendant signed a paper stating that "at his request the plaintiff had consented on his paying the costs of the action as between attorney and client, and making an apology for his conduct, to stay the proceedings therein," the court held that it was an absolute and not a conditional agreement, and in default of defendant paying the costs, made a rule absolute for signing the judgment as for want of a plea. (Yardrew *v.* Brook, 2 Nev. & M. 835.) As to the settlement of an action for slander as the consideration for a promise, see O'Kesson *v.* Barclay, 2 Penn. St. R. 531; approved Morey *v.* Newfane Township, 8 Barb. 653; and see Shephard *v.* Watrous, 3 Caines R. 166. By statute 6 & 7 Vict. ch. 96, it is provided that in any action for defamation, the defendant, after notice, may give in evidence, in mitigation, the making or offer to make an apology.

[5] Smith *v.* Kerr, 1 Barb. 155. See Effie *v.* Jacob, 1 Jebb & Symes, 257. An accord and satisfaction by one or some of several wrong-doers, is a satisfaction as to all. (Strang *v.* Holmes, 7 Cow. 224; Knickerbacker *v.* Colver; 8 *Id.* 111.) It follows that a partial satisfaction, by one of several wrong-doers, is a satisfaction *pro tanto* as to all. (Merchants' B'k *v.* Curtis, 37 Barb. 320.) As to a plea of apology and payment into court

did not require to be specially pleaded.[1] Now it must be pleaded specially.

§ 251. A former recovery for the *same* cause is a bar to an action for slander or libel.[2] A judgment in an action of slander, for a particular charge, bars any other action against the defendant in that action for the same charge, though made on a different occasion, if made before suit brought; and, therefore, though there be but one count for particular words, proof that they were spoken by defendant on distinct occasions before suit commenced is competent.[3] It is no bar to an action for slander or libel that in a former action for the publication of the same words, on an occasion different from that alleged in the declaration, the defendant obtained a verdict and judgment in his favor. It was not for *the same* cause of action.[4] A recovery by the husband for slanderous words spoken of himself and wife, is not a bar to another action by the wife for the same slanderous words, in which the husband is joined as a nominal party plaintiff.[5] A recovery in an action for calling plaintiff a

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in England, see Stat. 6 & 7 Vict. ch. 96; 15 & 16 Vict. ch. 76; Chadwick *v.* Herepath, 3 C. B. 885; O'Brien *v.* Clements, 3 Dowl. & L. 676; Lafone *v.* Smith, 3 Hurl. & N. 735; 4 *Id.* 158; Ingram *v.* Ferguson, 1 New Pr. Cas. 486.

[1] 2 Greenl. Ev. 321; Lane *v.* Applegate, 1 Stark. 97; King *v.* Waring, 5 Esp. 13; Eiffe *v.* Jacob, 1 Jebb. & S. 257.

[2] Campbell *v.* Butts, 3 N. Y. 173. The plaintiff having once recovered, cannot afterwards recover for any subsequent loss by the same words. (Bull. N. P. 7.) Where the cause of action is the same, a judgment between the same parties is binding on each, and it is immaterial that the form of action is different, if the cause of action be the same. (Hitchin *v.* Campbell, 2 W. Bl. R. 827.)

[3] Root *v.* Lowndes, 6 Hill, 518.

[4] Henson *v.* Veatch, 1 Blackf. 369.

[5] Bash *v.* Sommer, 20 Penn. (8 Harris) 159; and see *ante*, note 3, p. 153. A recovery against one of several parties to a joint tort frequently precludes the plaintiff from proceedings against any other party not included in such action. (Cro. Jac. 74; Yelv. 68.) But where the evidence and the damage in the two actions might be different, as where two persons on different occasions have published the same libel, separate actions may be supported against each. (2 B. & P. 69.) Where a verdict with nominal damages (40s.) had been obtained against the publisher of a libel, that

thief, not in the way of his trade, held not to be a bar to a subsequent action for words imputing to plaintiff in the way of his trade that he was dishonest and a cheat."[1] A recovery in an action for malicious prosecution is a bar to a subsequent action for slander, for the accusation uttered for the purpose of having the arrest made, and on the occasion when it was made.[2] But where the defendant published the accusation before or after making his complaint to have the plaintiff arrested, an action for that publication is not barred by the recovery in the action for the malicious prosecution.[3] An application for a criminal information against a party for the publication of a libel, which application has been refused, is no bar to an action on the case for the same ground of complaint.[4] At one time the defense of a former recovery might be given in evidence under the general issue;[5] now, the defense of a former recovery must be pleaded.

§ 252. Whatever else may be intended by the phrase "freedom of the press," or "liberty of the press," it means the freedom or liberty of those who conduct the press. This freedom or liberty, properly understood, means only that for which Milton put forth his eloquent plea: "unlicensed printing." "The liberty of the Press consists in printing without any previous license, subject to the consequences of law. The licentiousness of the Press is

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was held not to be any justification in an action against the author of the libel, nor to furnish any reason for not giving substantial damages, and the plaintiff had a verdict for £450. (Frescoe *v.* May, 2 Fost. & F. 123.) The pendency of other actions against other publishers of the same defamatory matter, not a mitigating circumstance. (Harrison *v.* Pearce, 1 Fost. & F. 567.)

[1] Wandsworth *v.* Bentley, 23 Law Jour. Q. B. 3; 17 Jur. 1077.

[2] Sheldon *v.* Carpenter, 4 N. Y. 579. And *semble*, a recovery in an action for slander will not bar an action for malicious prosecution. (Jarnigan *v.* Fleming, 13 Missi. 911.)

[3] Rockweller *v.* Brown, 36 N. Y. 207; and see Schoonover *v.* Rowe, 7 Blackf. 202.

[4] Wakley *v.* Cooke, 16 Law Jour. Rep. 225, Ex.; 9 Law Times, 513; 16 M. & W. 822.

[5] Campbell *v.* Butts, 3 N. Y. 173.

Pandora's box, the source of every evil."[1] "The liberty of the Press is connected with natural liberty. The use and liberty of speech were antecedent to Magna Charta, and printing is only a more extensive and improved kind of speech."[2] "The liberty of the press, therefore, properly understood, is the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the Press."[3] "The liberty of the Press consists in the right to publish with impunity, truth with good motives and for justifiable ends, whether it respects governments, magistracy, or individuals."[4] In the sense of unlicensed, the press has been free since A. D. 1694.[5] And, except in respect to newspapers,

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[1] Attributed to Lord Mansfield, cited Root *v.* King, 7 Cow. 628, and commented on 1 Mence on Libel, 158.

[2] Essay on the liberty of the Press, chiefly as it respects personal slander, by Bishop Hayter, p. 6.

[3] Holt on Libel, B'k 1, ch. iv.

[4] Hamilton arg. The People *v.* Croswell, 3 Johns. Cas. 360. And see The Federalist, No. 81; The Fourth Estate; Areopagitica, a speech for the liberty of unlicensed printing (Holt White's edition is the best); Story on the Constitution, §§ 1880 to 1889; 1 Tindal's continuation of Rapin's History of England, 350, Remarks on Pultney's bill to prohibit the circulation of unlicensed newspapers.

[5] On the introduction of the printing press into England, at the expense of the Government, the press was regarded as a State right, and subject to the coercion of the crown. (See Hills *v.* University of Oxford, 1 Vernon, 275; Basket *v.* University of Cambridge, 2 Burr. 661.) It was regulated, therefore, by the king's proclamations, prohibitions, charters of privileges, and licenses, and then by the decrees of the Court of the Star Chamber, until the abolition of that court, in 1641. The Long Parliament, in 1643, assumed the power of licensing, and this was continued by various statutes till 1694. The printing press was regarded as too dangerous a contrivance to be suffered to be free. Governor Dongan was instructed (A. D. 1688) not to allow any printing press in New York, although Massachusetts had at that time enjoyed a printing press for nearly thirty years. The judges were unanimously of opinion that by the common law of England no man not authorized by the crown, had the right to publish political news. (London Gazette, May 5 & 17, A. D. 1680.) "It was from the press that originated what is in fact the main distinction of the ancient and modern world, public opinion." (Holt on Libel, 61.) Whittier calls a newspaper an "opinion mill," and speaks of an editor who

> Had left the Muses' haunts to turn
> The crank of an opinion mill.

The Constitution of the United States provides: Congress shall make no law abridging the freedom of speech or of the press. (Am'dm't of 1789, art. i.) The

no greater degree of liberty for the press has ever been claimed. But as respects newspapers, it is argued that the exigencies of the business of a newspaper editor demand a larger amount of freedom. That circumstances do not permit editors the opportunity to verify the truth, prior to publication, of all they feel called upon to publish, and that they should not be responsible for the truth of what they publish. Some concessions have already been made to these arguments. At present the law takes no judicial cognizance of newspapers, and independently of certain statutory provisions, the law recognizes no distinction in principle between a publication by the proprietor of a newspaper and a publication by any other individual.[1] A newspaper proprietor is not privileged as such in the dissemination of news, but is liable for what he publishes in the same manner as any other individual.[2] This being the case, after referring to the statutory provisions affecting publications in newspapers, it will be unnecessary separately to consider what a newspaper pro-

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Constitution of New York provides: Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press. (Constitution of 1846, art. 7, § 8.) This is repeated in the Bill of Rights of that State, and similar provisions are, we believe, to be found in the Constitution of every State of the Union.

[1] Davidson *v.* Duncan, 7 El. & B. 231; Campbell *v.* Spottiswoode, 8 Law Times Rep. N. S. 201; 3 Fost. & F. 421.

[2] Sheckell *v.* Jackson, 10 Cush. 25. The right to criticise is general; it is not the peculiar privilege of the press. (Kane *v.* Mulvany, 2 Ir. C. L. 402.) A writer in a newspaper has no other or greater privilege than any other individual. (Campbell *v.* Spottiswoode, 8 Law Times Rep. N. S. 201.) As to privilege, there is no difference between a publication by a newspaper or a private individual. (Davison *v.* Duncan, 7 El. & B. 231.) Conductors of the public press are not privileged as such in the dissemination of news, but are liable for libellous publications, like other persons, without proof of express malice. (Sheckell *v.* Jackson, 10 Cush. (Mass.), 25.) On March 14, 1859, in the New York Senate, Mr. Ely introduced a bill to amend chapter 130 of the Laws of 1854 by providing that no publication in any newspaper, respecting any person holding office shall be deemed a libel, and providing that any assault upon the person of an editor who has made any such publication shall not be illegal or punishable, unless resulting in the death or maiming of the person assaulted.

prietor may or may not publish with impunity; we can review his rights and duties under the general head of criticism.[1]

§ 253. To criticise, in its widest signification, means passing an opinion, commenting. In this sense every one is continually criticising,[2] and every one is continually furnishing occasion for criticism. Criticism may mean praise or censure. The latter is the sense in which it is more frequently employed, and is the only sense in which it enters into our present inquiry. We use criticism as a synonym for "fault-finding." Sometimes the term criticism is limited so as only to indicate "fault-finding"

[1] Among the statutory provisions relating to libels in newspapers are: 38 Geo. III, ch. 78, entitled, An act to prevent the publication of newspapers by persons not known, &c., among other provisions, requires that before any newspaper is started, the proprietor must file an affidavit by the printer, publisher, and proprietor, stating the place where the paper is to be printed, and its title. This act was amended 5 Wm. IV, ch. 2. 32 Geo. III, ch. 60, entitled, An act to remove doubts respecting functions of juries in cases of libel. This is the statute enabling juries to give a general verdict in actions of libel. The 18th section provides for a discovery in actions of libel. 60 Geo. III, ch. 8, amended, 1 Geo. IV, ch. 73; to prevent and punish blasphemous libels. 60 Geo. III, ch. 9; to restrain abuses arising from the publication of blasphemous libels. This act requires newspaper proprietors to give security to pay the damages and costs in actions for libels published in the papers owned by them. 6 & 7 Vict. ch. 96; an act to amend the law respecting defamatory words and libel. (Amended 8 & 9 Vict.) It provides, among other things, that in actions for libels in newspapers or periodicals, the defendant may plead that the libel was inserted without actual malice, and without gross negligence, and *before* the action, or at the earliest opportunity afterwards, he published an apology; and gives liberty, with the plea of apology, to pay money into court. This act, it has been held, does not apply to criminal prosecutions. (Reg. *v.* Duffy, 2 Cox Cr. Cas. 45; 9 Ir. L. R. 329.) As to this statute, see Chadwick *v.* Herepath, 3 C. B. 885; O'Brien *v.* Clements, 3 Dowl. & L. 676; Smith *v.* Harrison, 1 Fost. & F. 365; Jones *v.* Mackie, Law Rep. III, Ex. 1. As to the statutes of 60 Geo. III, see *Re* Chaplin, 2 Hurl. & Colt. 270; *Re* Clements, 12 Law Times, 380; 18 Law Jour. 304, Ex.; *Re* Gregory, 13 Law Times, 142; and see 32 & 33 Vict. ch. 24, which repeals 6 & 7 W. IV, ch 76. A plea of payment into court and apology not allowed with a traverse of the defamatory sense imputed (Barry *v.* McGrath, 3 Irish C. L. 576). Where there is a plea of payment into court, the payment is to be disregarded in assessing damages. (Jones *v.* Mackie, 37 Law Jour. 1, Ex.; 18 Law Times, N. S. 151.) As to plea of apology, see Rish Allah Bey *v.* Johnstone, 18 Law Times, N. S. 620. See in notes 1, p. 364, and 5, p. 435, *ante*, and Laws of N. Y. 1852, ch. 165; *Id.* 1868, ch. 430; Sanford *v.* Bennett, 24 N. Y. 20.

[2] What distinguishes man from the other animals is, that he alone has the faculty of meddling with what does not concern him.—The Abbé Galiani.

in matters of literature and art, or in respect to persons engaged in offices of public trust. We do not attempt to define, with any degree of precision, what is the ordinary sense of the term criticism, because we believe it has no definite connotation, and because we do not recognize any distinct or independent right, such as seems generally supposed to be implied in or to exist under the designation of *criticism*. In our opinion, one cannot, by styling defamatory matter criticism and the defamer a critic, escape from those rules which apply to defamatory matter generally.

§ 254. Criticism may be divided into criticism of persons and criticism of things. What one does, one's actions, are things, and as such have a separate existence distinct from the person. *Every action, every thing* one does, is naturally and necessarily the subject of comment. *Every action, every thing* one does confers a privilege upon every person to speak or write *concerning such action or thing*. As to such action or thing every one may, in good faith, speak or write whatever seems to him fit to be spoken or written (§ 204). Save good faith, there is no limit to criticism concerning a man's actions or his creations. "God forbid (exclaimed Baron Alderson)[1] that you should not be allowed to comment on the *conduct* of all mankind, provided you do it justly and honorably." "Public men, and above all public writers, must not complain if they are sometimes rather roughly treated. Public writers, who expose themselves to criticism, must not complain that such criticism is sometimes hostile."[2] "No criticism of a person holding a public office is libellous unless malicious."[3] "No one can doubt the importance in a free government of the right to canvass the *acts* of

[1] Gathercole *v.* Miall, 15 M. & W. 319.

[2] Campbell *v.* Spottiswoode, 3 Fost. & F. 421.

[3] Harle *v.* Catherall, 14 Law Times, N. S. 801.

public men and the tendency of public measures—to censure boldly the conduct of rulers, and to scrutinize the policy and plans of government. This is the great security of a free government."[1] "An editor may comment freely on the *acts* of government, officers or individuals, and indulge in occasional mirth and wit, and it is only when the character of the publication is malicious, and its tendency to degrade and excite to revenge, that it is condemned by the law, and subjects the publisher to prosecution."[2] "Liberty of criticism must be allowed, or we should have neither purity of taste or of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."[3] "Every man who publishes a book commits himself to the judgment of the public."[4] It is of the last importance to literature, and through literature to good taste and good feeling, to mor-

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[1] Story on the Constitution, § 1888.

[2] Tappan *v.* Wilson, 7 Ohio, 193.

[3] L'd Ellenborough, Tabart *v.* Tipper, 1 Camp. 350; and see Cooper *v.* Stone, 24 Wend. 442. An application for an information was refused against one for publishing that Ward's pill and drop had done great mischief in twelve different cases, and that they were a compound of poison and antimony, &c. (Rex *v.* Roberts, 3 Bac. Abr. tit. Libel, 492.) In Hibbs *v.* Wilkinson, 1 Fost. & F. 608, the action was for libel, first of the plaintiff generally, secondly as a clergyman. It appeared that defendant had published a pamphlet entitled "Truth Vindicated," and the alleged libels were contained in a review of that pamphlet published in a newspaper. Verdict for defendant; and by Erle, C. J.: Where the plaintiff and defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public, and in which the plaintiff *first* had recourse to the press, and made the matter public, it is important to see if malice has been made out against the party sued, or if he has published only what he believed was required for the interests of truth.

[4] Carr *v.* Hood, 1 Camp. 358. See Reede *v.* Sweetzer, 6 Abb. Pr. R. N. S. 9, in a note; a lengthy report of the trial of an action for libel on plaintiff as the author of Griffith Gaunt.

ality, and to religion, that works published for general perusal should be such as are calculated to improve, and not to demoralize, the public mind; and therefore it is of vast importance that criticism, so long as it is fair, reasonable, and just, should be allowed the utmost latitude, and that the most unsparing censure of works which are fairly subject to it should not be held libellous. A man who publishes a book challenges criticism; he rejoices in it if it tends to his praise, and if it be likely to lead to an increase in the circulation of his work, and therefore he must submit to it if it be adverse, so long as it is not prompted by malice, or characterized by such reckless disregard of fairness as indicates malice toward the author."[1]

§ 255. But, *as respects the person*, except in the instances and to the extent heretofore pointed out, *there is no privilege of criticism.* Defamatory language concerning a person can never be justified merely on the ground that it was published as a criticism. Whenever defamatory matter concerning a person is justifiable—*i. e.*, not actionable—it is on some other ground than that the language was published as a criticism. "No man has a right to render the person or abilities [inseparable incidents to the person] of another ridiculous."[2] "I think no *personal* ridicule of the author is justifiable."[3] If an author "has made himself ridiculous by his writings, he may be ridiculed; if his works show him to be vicious, his reviewer may say so. *But the latter has no right to violate the truth in* either respect."[4] "If the jury can discover anything *personally* slanderous against the plaintiff (an author) unconnected with the works he has given to the public, in

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[1] Cockburn, C. J., Strauss *v.* Francis, 4 Fost. & F. 1114.

[2] Holt, Ch. J., Rex *v.* Tutchin, 2 L'd Raym. 1061.

[3] Best, Ch. J., Thompson *v.* Shackell, 1 Mo. & Malk. 187.

[4] Cooper *v.* Stone, 24 Wend. 442. Does not this mean the reviewer can only justify ridiculing *an author*, or accusing *him* of being vicious, by a defense of truth.

that case the plaintiff has a good cause of action."[1] Without pretending to elicit the true source of the confusion of thought so obvious in all the dicta and decisions upon the subject of criticism, we venture to assert that the difficulty is occasioned by, (1) overlooking the distinction between language concerning the person and language concerning a thing; and (2) in treating certain persons—authors, artists, &c.—as if a rule applied to them and to their productions different from the rules which apply to the manufacturer and to the merchant. It seems not to have been kept in view that an author is but a producer, and the maker of a watch is *an author* equally with the maker of a book. There is nothing at this day in the vocations of the author, the actor, the painter, or the sculptor which makes the rights and duties of those who follow them less or greater than the rights and duties of those engaged in any other employment. We *should* construe language concerning an author or an artist by the same rules as we construe language concerning a lawyer, or a physician, a merchant, or a mechanic. "There is no doubt that a man

[1] L'd Ellenborough, Carr *v.* Hood. 1 Camp. 358. But in the same case his Lordship is reported to have said: "If the defendant only ridiculed the plaintiff *as an author*, the action could not be maintained."

In the case of Stuart *v.* Lovell, 2 Stark. Cas. 73, the plaintiff being one of the proprietors of the Courier newspaper, brought his action for libel against the defendant, the editor of the Statesman newspaper. Lord Ellenborough, in charging the jury, observed: "In the first place, the plaintiff was described as the prostituted Courier, and his full-blown baseness and infamy were represented as holding him fast to his present connections, and preventing him from forming new ones. It was certainly competent in *one public writer to criticise another*, exerting his talents in all the latitude of free communication belonging to a *public* writer; and so it appeared to Lord Kenyon, in Heriot *v.* Stuart, 1 Esp. Cas. 337, that the *opinions and principles* of a public writer were open to ridicule, in the same way as those of any other author, but that the privilege did not extend to calumnious remarks on the *private character* of the individual. In that respect, the editor of a newspaper enjoyed the rights of protection in common with every other subject. Since, then, the defendant in this case had stigmatized the defendant as the venerable apostle of tyranny and oppression, and as a man whose full-blown baseness and infamy held him fast to his present connection, because they left him without the power of forming new ones; in all this he had undoubtedly overstepped the limits which had been drawn, and by which his conduct ought to have been regulated."

who is an author has a right to have his character protected the same as if he acted in any other capacity. However, notwithstanding that, whatever is fair and can be reasonably said of the works of authors, *or of themselves as connected with their works*, is not actionable, unless it appear that under the pretext of criticising *the works*, the defendant takes the opportunity of attacking the character of *the author*, and then it will be a libel."[1] "I will not stop to weigh the argument which would disfranchise him (the plaintiff) because he is an author."[2] The essential questions in every case of criticism are, (1) Does the matter upon its face concern a thing? (2) and if it does, was it composed and published in good faith? Whatever other questions may arise, they are but secondary, and are, as already noticed (§ 204), material only so far as they serve to furnish answers to the two essential questions here mentioned.

§ 256. It was held to be within the limits of criticism to publish of a newspaper: "It is the most vulgar, ignorant, and scurrilous journal ever published in Great Britain."[3] This affected only the character of the newspaper, and not (except remotely) the reputation of any person. So it is within the limits of criticism to publish of a painting, that it was a mere daub, with other strong

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[1] Tenterden, C. J., Macleod *v.* Wakely, 3 C. & P. 311. If the critic go out of his way to attack the private character of the author, such an attack is a libel. (L'd Abinger, Fraser *v.* Berkeley, 7 C. & P. 621.) It is important that a line should be drawn between fair discussion for the promotion of the truth and publications for the aspersion of personal character. (Erle, C. J., Hibbs *v.* Wilkinson, 1 Fost. & F. 610.)

[2] Cooper *v.* Stone, 24 Wend. 442. In all cases of criticism, "The question is one of good faith." (*Id.*) "The only question is, whether there was any excess in the comments; that was matter entirely for the jury." (Cockburn, C. J., Kelly *v.* Tinling, Law Rep. 1 Q. B. 701.) If it be shown that the comment is unjust, is malevolent, and exceeding the bounds of fair opinion, it is actionable. (Dibdin *v.* Swan, 1 Esp. 28.)

[3] Heriot *v.* Stuart, 1 Esp. Cas. 437; but it was in that case held *actionable* to publish of a newspaper, that it was low in circulation. And see Latimer *v.* West. Morning News Asso., 25 L. T. N. S. 44.

terms of censure;[1] or of an architect, that he acts on absurd principles of art.[2] In both of the two last preceding cases, it was left to the jury, as a question of fact, whether the censure was unfair and intemperate, and intended to injure the persons of the plaintiffs. It was held not to be within the limits of criticism to publish of the plaintiff, a floricultural exhibitor, "the name of G. is to be rendered famous in all sorts of dirty work; the tricks by which he, and a few like him, used to secure prizes, seem to have been broken in upon by some judges, more honest than usual. If G. be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice; if he be not the same man, it is a pity that two such beggarly souls could not be crammed into the same carcass."[3] Nor is it within the limits of criticism to write of the publisher of a magazine, that he had inserted in his magazine a series of articles, the greater part of which were false and of a gross character;[4] nor to write of a book publisher, that he published books of an immoral character, and ascribing to him the authorship of some silly rhymes.[5] Where the plaintiff, a surgeon, had presented a petition to Parliament against empirics and irregular practitioners, and defendant, in a medical journal, had commented on the petition, reflecting

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[1] Thompson *v.* Shackell, 1 Mo. & Malk. 187.

[2] Soane *v.* Knight, 1 Mo. & Malk. 74.

[3] Green *v.* Chapman, 4 Bing. N. C. 92; 5 Sc. 340.

[4] Colburn *v.* Whiting, cited Cooke on Defam. 58, and see Cooper *v.* Stone, 24 Wend. 434. Where it is said not to be within the limits of criticism to impute to an author falsehood and unworthy motives in the production of a book.

[5] Tabart *v.* Tipper, 1 Camp. 350, the rhymes were:

There was a little maid,
And she was afraid
Her sweetheart would come to her,
She bound up her head,
When she went to bed,
And she fastened her door with a skewer.

And were followed by this line:

Dixin ego vobis Atticam quandam inessee elegantiam.

on the plaintiff for ignorance generally, and particularly in chemical knowledge; and the judge had directed the jury, that if they considered the libel a fair comment on the petition, and not a malicious effusion against the plaintiff, and also if they considered that it imputed to him ignorance in chemistry only, and not in his profession as a surgeon, to find for the defendant, which they did; the court granted a new trial.[1] Where the plaintiff, a "marine store dealer," had exhibited a placard in front of his store, offering certain prices for kitchen stuff, candle ends, pewter, plated goods, &c., and proposing to fetch them from private houses. Some observations upon this placard had been made by a magistrate officially; upon which the defendant published in a newspaper an article headed, "Encouraging servants to rob their masters," and imputing that the placard was calculated or intended to encourage servants to rob their masters. The placard was held to be a proper subject of criticism, and as the article did not go beyond the placard, or attack the plaintiff in anything not fairly arising out of that document, it was held privileged.[2]

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[1] Dunne *v.* Anderson, 3 Bing. 88. The reporter, erroneously as we think, puts this decision on the ground that presenting a petition to Parliament is an act not obnoxious to criticism. The error for which the new trial was granted was the direction to find for the defendant, if the imputation was of ignorance in chemistry only.

[2] Paris *v.* Levy, 9 C. B. N. S. 342 (in banc); 2 Fos. & F. 71 (nisi prius). It was held not to be a libel upon a dealer in coal in L., who had advertised genuine Franklin coal for sale, to publish the following advertisement: "Caution.—The subscribers, the only shippers of the true and original Franklin coal, notice that other coal dealers in L. than our agent, J. S., advertise Franklin coal. We take this method of cautioning the public against buying of other parties than J. S., if they hope to get the genuine article, as we have neither sold nor shipped any Franklin coal to any party in L., except our agent, J. S." (Boynton *v.* Remington, 3 Allen, 397.)

In a previous note (No. 4, p. 346) we directed attention to the views of Lord Chief Justice Cockburn on criticism; we recur to the subject to give some extracts from his charge in the case of Seymour *v.* Butterworth, reported at length in the "Law Magazine and Law Review" (London), February, 1863, and given in an abridged form in The Monthly Law Reporter (Boston), May, 1863; also reported 3 Fost. & F. 384. The plaintiff, a barrister, Recorder of Newcastle-upon-Tyne, and member of Parliament, sued for an alleged libel upon him, published in the Law Magazine. We

§ 256*a*. The conduct of a party to a suit, in giving his testimony as a witness in a court of justice, is a fair subject

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find in the charge: (1.) A man's public political conduct is matter for the freest and fullest discussion on the part of a writer in a public journal. (2.) To animadvert on those who lend themselves to a system of buying and selling votes in Parliament, "is within the legitimate province of a *public writer*," but if he goes beyond that, and asserts that one "has bargained to sell his vote," it is a charge which no man, whether writing in public or in private, ought to dare to make. (3.) All men who occupy public positions must submit, now and then, to be a little roughly handled, and to be uncourteously and even unjustly treated, and people must not be too thin-skinned in reference to such matters. It has happened to everybody who has had anything to do with public life, to have, at one time or other, observations made upon his conduct and motives, which, in all probability, at the bottom of his heart, he has felt to be unfounded and unjust; but we submit to it, and why? because we know that, upon the whole, that bringing, by means of the public press, the conduct and motives of public men to the bar of public opinion, is the best security for the discharge of public duty. (4.) It is claimed that, although the conduct of a public man is open to public discussion, his *private conduct* is not, and that it does not lie in the mouth of a man, who has attacked another with reference to his *private conduct*, to say, I did it only in the fair discharge of a public duty. But there is this distinction in this case, that, however true that proposition may be with reference to the *private conduct* of a *private individual*, the plaintiff does not occupy the position of a *private individual*. * * * It is impossible to say the plaintiff was not a *public man*, and that his conduct, if it had reference to his fitness to be a *public man* and to occupy a public position, was not a matter fit for discussion. (5.) I must dissent from the proposition, that where a man holds a public position in which integrity, honesty, and honor are essential and indispensable qualifications, if in his private conduct he shows he is destitute and devoid of those essential elements, that it is not a fair subject for public animadversion and hostile criticism, *so long as the writer confines himself within the bounds of truth and within the limits of fair and just observation*. Elsewhere in the charge his Lordship speaks of the rights and duties of a public writer, and generally speaks as if a public writer was a person with peculiar rights and duties, whereas the law recognizes no such office as that of a public writer, and gives him no privileges except as mentioned *ante*, note 1, p. 364. We do not consider sound the distinction between public men and private men, and public acts and private acts. To say, as is said in the fifth of the foregoing extracts, that one may criticise "*so long as the writer confines himself within the bounds of truth and within the limits of fair and just observation*," is merely saying one may publish the truth, and criticise where it is fair and *just* to do so. To limit criticism to just criticism, is in effect to toll the right of criticism, as it substitutes the judgment of the jury for the judgment of the critic. In another case, Strauss *v.* Francis (4 Fost. & F. 939), also tried before Lord Cockburn, the plaintiff was the author of a novel called "The Old Ledger," and the defendant the editor of the Athenæum. The defendant published a criticism of this novel, for which the plaintiff brought an action for libel, and on the trial withdrew a juror. The defendant then published an article under the heading "The Rights of Criticism," in which he republished the original criticism, with comments on the trial at which the plaintiff withdrew a juror. In an action for this second publication (4 Fost. & F. 1108), the judge charged the jury "that the action related to two separate matters of complaint, which should be kept distinct—first, the review on the work; next, the comments on the trial. The repub-

of comment. The administration of justice is a matter of public interest, and therefore a proper subject of public

lication of the criticism on the work brought it under the notice of the jury, and it would be for them to say whether the criticism was fair and reasonable, or whether the writer of it was actuated by malice. That it was severe there could be no doubt, but the question was, was the severity warranted by the nature of the book. It was conceded that it was of vast importance to literature, and through literature, to the morals, religion, good taste, and good feelings of the public, that works which were laid before them for their perusal should be of such a character that they would improve and not demoralize. It was, therefore, right and wholesome that criticism, so long as it was fair and just, should be allowed the largest latitude. Authors courted criticism, because, if it were favorable, it would secure popularity for, and extend the circulation of, their works; but, as they challenged criticism, they should submit to it when it was adverse, so long as it was not prompted by recklessness or malice. It had been contended on behalf of the plaintiff that it was unfair to select isolated passages from a work and fasten on them, disparaging the spirit and character and object of the entire book; but that observation was open to this remark, that it was not because a work might, as a whole, be good, that a critic, if he found many passages of an obnoxious character, must abstain from commenting on them. That some of the passages read warranted the charge of indelicacy, some the charge of profanity, and many of them the charge of gross vulgarity, was, he thought, a matter as to which they could not fail to give an answer in the affirmative. The fair critic was a prosecutor who brought to the bar of public opinion offenders against good taste, against delicacy and propriety. The work in question was denounced as being abominable. That was no doubt a strong expression. It was for the jury, having the book before them, and having heard what had been said for and against it, to say whether the criticism in question was a fair representation of the character of the work. The jury found for the defendant. In another case, Campbell *v.* Spottiswoode, (3 Fost. & F. 421), we quote from the London Quarterly Review of April, 1865, art. Libel. The plaintiff, the editor of the British Standard, had published in that newspaper a series of appeals on behalf of Missions to China. The alleged libel was an article published in the Saturday Review, commenting on those appeals, and in which the plaintiff was called an "impostor," and charged "with scandalous and flagitious conduct." On a trial before Lord Cockburn, the plaintiff had a verdict, the judge charging the jury that the defendant had exceeded the limits of criticism, and added, "It cannot be said that because a man is a public man, a writer is entitled not only to pass judgment upon his conduct, but to ascribe to him corrupt and dishonest motives." A motion for a new trial was denied; Lord Cockburn, in giving judgment (8 Law Times Rep. N. S. 201; 3 B. & S. 769; 3 Fost. & Fin. 421, note), said: "But it seems to me that a line must be drawn between hostile criticism upon a man's public conduct, and the motives by which that conduct may be supposed to be influenced, and that you have no right to impute to a man in his conduct as a citizen—even though it be open to ridicule or disapprobation—base, sordid, dishonest, or wicked motives, unless *there is so much ground for the imputation that a jury shall be of opinion, not only that you may have honestly maintained some mistaken belief upon the subject, but that your belief is well founded and not without cause.*" We do not understand the part in *italics*. In our opinion his Lordship should have said that you must not impute dishonest or wicked motives, unless you can establish the truth of the imputation. He came very near to our views in Turnbull *v.* Bird (2 Fost. & F. 508),

comment;[1] where the libel was a comment upon a proceeding before a magistrate, the court charged, that if the publication meant that the magistrate had acted hastily in dismissing the case, and that it would have been more satisfactory if all the evidence had been heard that would be legitimate comment; but if, under the pretence of commenting upon the magistrate, the publication was intended to charge the plaintiff with being guilty of the offense for which he had been arraigned, it was not privileged.[2]

§ 257. As the right of criticism is confined to criticising actions or things, it necessarily follows that as a preliminary to all right of criticism, it must appear that the action or thing criticised had an existence; therefore, a justification on the ground of criticism can never prevail, unless the existence of the action or thing, which the criticism is alleged to concern, is either admitted or proved. An alleged criticism consists in the statement or assumption of certain *facts*, and of comments thereon. Where

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(we still quote from the London Quarterly), in which he charged the jury, "if you are of opinion that the defendant, in the comments that he made, was guilty of any *wilful* mis-statement of fact, either by the exaggeration of what actually existed, or by the partial suppression of what actually existed, so as to give it another color, or if he makes his comments with any mis-statement of fact, *which he must have known to be a mis-statement, by the exercise of ordinary care*, then he loses his privileges, and the occasion does not justify the publication." We should indorse this if the words in *italic* were omitted. See, however, Cooper *v.* Lawson, 8 Adol. & El. 746.

Publication, by Reform Commissioners, of a report imputing bribery to plaintiff, giving his name as one who had been sued for bribery, was held not privileged. (Wilson *v.* Reed, 2 Fost. & F. 149.) The plaintiff was the publisher of Zadkiel's Almanac, an astrological publication; the defendant charged that the plaintiff, being the publisher of that silly work, had *gulled* by means of a magic ball of crystal in which future events could be seen; held that this could be justified only by proving that plaintiff, knowing it to be an imposture, took money from the public for the use of said ball. (Morrison *v.* Belcher, 3 Fost. & Fin. 614.) See Eastwood *v.* Holmes, 1 Fost. & Fin. 347. A publication of a report of an inspector of charities under the charitable trust act, containing a letter written several years previously, reflecting on plaintiff, held conditionally privileged. (Cox *v.* Feeney, 4 Fost. & Fin. 13.)

[1] Kane *v.* Mulvany, 2 Ir. C. L. 402; and see Hedley *v.* Barlow, 4 Fost. & F. 227.

[2] Hibbins *v.* Lee, 4 Fost. & F. 245; and see Woodgate *v.* Ridout, 4 Fost. & F. 202.

these facts are not admitted, to constitute a justification their existence must be shown. Hence, to justify a criticism, it is sometimes necessary to allege, that the facts which warrant *a* criticism exist, and that the comment on those facts is fair.[1] Where the defamatory matter was that plaintiff, a tradesman in London, became surety for the petitioners in the Berwick election petition, and falsely stated on oath a sufficient property qualification, when, in truth, he was not able to pay his debts. It then asked why the plaintiff, being unconnected with Berwick, should take so much trouble and incur such an exposure of embarrassments, and proceeded: "There can be but one answer to these queries—he is hired for the occasion." The defendant justified as true all the publication, except the charge of being hired, as to which no mention was made, and, as a further defense, that the publication was a correct report of judicial proceedings, with a fair and *bona fide* commentary thereon. Held, it was properly left to the jury to say whether the imputation that the plaintiff was hired was a fair comment.[2]

§ 258. As criticism is *opinion*, it can never be *primarily* material to inquire into its justness. The right to criticise implies the right to judge for one's self of the *justness of the criticism*. It would be but a delusion to say one has the right to criticise *provided* the criticism be just. The justness or unjustness can never be more than matter of opinion. The test always is, was the criticism *bona fide*. It is like the case of one writing concerning the sanity of another; the test of the justification is not, was the state-

[1] Fry *v.* Bennett, 1 Code Rep. N. S. 239; 5 Sandf. 54; Buddington *v.* Davis, 6 How. Pr. R. 401. "The occasion of the publication of libellous matter is never irrelevant, and is for the jury, and the jury have to consider taking into view the occasion on which matter is written which might injure another, is it a fair and proper comment, or is it not more injurious than the circumstances warranted? But on the other hand it has never been held that the occasion being lawful can justify any libel however gross." (Reg. *v.* Hicklin, Law Rep. III. Q. B. 376, Blackburn, J.)

[2] Cooper *v.* Lawson, 8 Adol. & El. 746.

ment such as a man of sound sense would have made, but was it the honest conviction of the publisher (§ 206). Although that was a case of comment or giving an opinion or criticism, was in fact, a criticism *concerning the person*, and found its justification, not in its being a criticism, but because the publication was made to protect the interest of another. When it is argued that the right to criticise rests upon the interest which the community generally may have in the subject of the criticism, it is a confusion of two different and distinct rights. The community are no more interested in the person or reputation of any one individual than in the person or reputation of any other member of society. Nor is there any foundation for the distinction sometimes attempted to be drawn between the *public* and the *private* character or standing of an individual; and although there are isolated *dicta* that appear to favor the idea that a person occupying a public situation is thereby rendered, personally, a subject of criticism, yet, as we conceive, the context of these *dicta* so far explains them as to limit the right of criticism to the *actions*. Thus it has been said: "Every man has a right to discuss matters of public interest. A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury—we are all of us the subjects for public discussion; and provided a man whether in a newspaper or not, publishes a comment on a matter of public interest, fair in tone and temperate, although he may express opinions that you may not agree with, that is not a subject for an action for libel; because whoever fills a public position, renders himself open to public discussion; and if any part of his public acts is wrong he must accept the attack as a necessary though unpleasant circumstance attaching to his position. In this country everything, either by speech or writing, may be discussed for the benefit of the public. No doubt, therefore, the defendant was at liberty to discuss the opinions

or proceedings of the plaintiff. If he has done it fairly, temperately and calmly, then he is not a fit subject for an action for libel."[1] "Every individual has a right to comment on *those acts* of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander. There is indeed, a material distinction between publications relating to public and to private *persons*, as regards the question whether they be libellous. That criticism may reasonably be applied to a public man in a public capacity, which might not be applied to a private individual."[2] The first sentence in this last quotation refers to acts, and is correct; and although the remarks in the subsequent sentences profess to apply to *persons*, yet they can be regarded as stating the law correctly only by limiting them to the *acts* of public men. Apart from the obsolete statutes of *scandalum magnatum* there is no distinction of persons, nor any division of persons into public and private (§ 181).

§ 259. The *supposed* distinction between matters of fact and matters of opinion, is sometimes referred to as marking the difference between justifiable or unjustifiable comment or criticism. Criticism, it is said, is matter of opinion; and that while all expression of opinion is justifiable, a statement of fact is not justifiable, unless on the ground of truth.[3] This view is unsound. In one sense it is merely the expression of an opinion to say of a minister he entered the pulpit in a towering passion; but such an assertion cannot be justified as criticism.[4]

§ 260. Stress is sometimes laid upon the fact that the criticism is upon a *public* act, implying that it is the publicity of the act upon which the right of comment

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[1] Bramwell, B., Kelly *v.* Sherlock, Law Rep. I. 689, Q. B.

[2] Parmiter *v.* Coupland, 6 M. & W. 108.

[3] See Popham *v.* Pickburn, 7 Hurl. & Nor. 891; *ante*, §§ 163, 241 and note 7, p. 219.

[4] Walker *v.* Brogden, 19 C. B. N. S. 64.

depends. We shall not attempt to distinguish between public and private acts, because we are of the opinion that it cannot directly make any difference in the right to criticise, whether the act be done privately or publicly. It was this supposed distinction between public and private acts, which occasioned the dubiety on the question whether a sermon, not otherwise published than by its delivery from the pulpit, by a minister to his congregation, was the subject of criticism.[1] A churchwarden having written to the plaintiff, the incumbent, accusing him of having desecrated the church, by allowing books to be sold in it during the service, and by turning the vestry room into a cooking apartment, the correspondence was published without the permission of the plaintiff, in the defendant's newspaper, with comments on the plaintiff's conduct. Held, that the correspondence involved a subject of *public* interest, which might be made the subject of public discussion, and the publication of the correspondence was not actionable, unless the language used was stronger than the limits of fair criticism allow.[2] Upon principle, private acts are, equally with public acts, the subjects of criticism. But whether the act be a public or a private act, may make a difference in determining whether the criticism was in good faith.

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[1] Gathercole *v.* Miall, 15 M. & W. 319; 10 Jurist, 337; 7 Law Times, 89; 15 Law Jour. Rep. 179, Ex. In the same case it was held that the conduct of the vicar of a parish, in establishing a parochial institution for charitable purposes, by the rules of which all persons not members of the Church of England are excluded from the benefit of the charity, is not a public act or the act of a public functionary, so as to entitle the public press or others to comment on it as such. A plea of fair comment, that the plaintiff's dealings with his tenants was a matter of public notoriety, and had formed the subject of a letter written to plaintiff on behalf of the tenantry by the parish priest; and that the whole subject of the law of landlord and tenant was a matter of public interest and discussion, held that the plea stated no defense and leave to plead it was denied. (Hogan *v.* Sutton, 16 Weekly Rep. 127.)

[2] Kelly *v.* Tinling, Law Rep. I. 699, Q. B.

CHAPTER X.

CORPORATIONS.

Corporations are legal persons—Their rights and duties assimilated to those of natural persons—Can act only through agents—May carry on business, sue and be sued, and are liable for injuries committed by agents—Corporations may have a reputation—Language concerning corporations—Actions by corporations for libel—Corporations cannot be guilty of slander—May be guilty of libel.

§ 261. Corporations, whether aggregate or sole, are *legal persons*. Hitherto, attention has been directed *exclusively* to language published by or which concerned *natural* persons or their affairs; it will now be in order to consider the rights and duties of *legal* persons or corporations in respect to the publication of language. The topic has been comparatively but little adjudicated, and to the decisions upon it the remarks contained in a former section (§ 15) appear peculiarly applicable. The great and ever increasing number of corporations, assuming all the functions of individuals, has created a tendency in the modern decisions to assimilate, so far as possible, the rights and duties of corporations to the rights and duties of natural persons.[1] It is the distinctive feature of a corporation that it can *only* act by or through its officers or agents;[2] for even in the case of a corporation sole, the

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[1] Conro *v.* Port Henry Iron Co., 12 Barb. 28.

[2] First Baptist Church *v.* Brooklyn Fire Ins. Co., 18 Barb. 69; Story on Agency, § 16.

individual who represents that corporation, and the corporation, are distinct entities. Ordinarily, a corporation may acquire and possess property, and carry on business, and it may sue and be sued in like manner as an individual,[1] and is liable for an injury committed by its servants or agents, in all cases where, under like circumstances, an individual would be liable.[2] Accordingly, it has been held that an action lies against a corporation for malicious prosecution or for a trespass,[3] or for a libel.[4]

§ 262. A corporation, like an individual, may have a reputation, and a good reputation is equally as valuable to a corporation as to a natural person;[5] and as an individual may sustain injury by language affecting his reputation, so in like manner may a corporation. As in regard to language affecting individuals, we distinguish between language concerning the person as such, and

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[1] The Constitution of the State of New York provides, (Art. 8 § 3.) All corporations shall have the right to sue, and shall be subject to be sued in all courts, in like cases as natural persons.

[2] First Baptist Church in Schen. *v.* Schen. & Troy R. R. Co., 5 Barb. 80, and see Pritchard *v.* Corporation of Georgetown, 2 Cranch Cir. Ct. 191; Watson *v.* Bennett, 12 Barb. 196; New Haven R. R. Co. *v.* Schuyler, 34 N. Y. 30, 208; Hunter *v.* Hudson River R. R. Co., 20 Barb. 507; Sharp *v.* Mayor of New York, 40 Barb. 273; Rochester White Lead Co. *v.* City of Rochester, 3 N. Y. 468; Green *v.* London Omnibus Co., 6 Jurist, N. S. 228; see *ante*, § 123.

[3] Eastern Counties Railway *v.* Brown, 6 Ex. 314; Roe *v.* Birkenhead Railway Co., 7 Ex. 36; Goodspeed *v.* East Haddam Bank, 22 Conn. 530; McFadzen *v.* Mayor of Liverpool, Law Rep. III. Ex. 279. In Owsley *v.* Montgomery &c. R. R. Co., in Alabama, it was held, but as we conceive erroneously, that a corporation, although liable for false imprisonment, was not liable for malicious prosecution; and in Childs *v.* State B'k of Mo., 2 Ben. 213, it was held that neither an action for malicious prosecution, for slander, nor for false imprisonment, could be maintained against a corporation; and see Stevens *v.* Midland Counties R'way, 10 Ex. 355.

[4] Phil. R. R. Co. *v.* Quigley, 21 How. U. S. R. 202; Aldrich *v.* Printing Press Co. 9 Min. 133; Lawless *v.* Anglo Egyptian Cotton Co., Law Rep. IV. Q. B. 262; Maynard *v.* Firemans Ins. Co., 34 Cal. 48; Latimer *v.* West. Morn. News Co. 25 Law Times, N. S. 44. In New York by statute (Laws 1860, ch. 90), a married woman may maintain an action in her own name, against any "body corporate," for any injury to her person or character, the same as if she were sole.

[5] Trenton Ins. Co. *v.* Perrine, 3 Zab. 402.

language concerning the person in a trade, and language concerning a thing or the affairs of a person; so in regard to language affecting corporations, we must distinguish between language concerning a corporation for different objects, as those engaged in manufacturing, trading, or banking, and those not so engaged, and language concerning the things of a corporation. Of course language concerning the corporators is not within the limits of our present inquiry. Where the defendant published, with other defamatory matter, that his hat had been stolen by *some* of the members of No. 12 Hose Company. The Hose Company was a volunteer association, and the members of the Association brought a joint action for this publication; held, that the action could not be maintained.[1]

§ 263. Language concerning a corporation not engaged in any business, can hardly occasion, and certainly does *not necessarily* occasion it any pecuniary injury; therefore, in regard to language concerning such a corporation, no action can be maintained except upon proof of special damage; but as regards a corporation engaged in manufacturing, trading or banking, or other occupation in which credit may be material to its success, there language concerning such a corporation calculated to injuriously affect its credit, must *necessarily* occasion it pecuniary injury, and in such a case an action may be maintained by the corporation without proof of any special damage. Thus as regards language concerning corporations, some is actionable *per se*, and some is actionable only by reason of special damage.

§ 264. In the case of an action by a corporation, a mutual life insurance company, against the editor of a

[1] Giraud *v.* Beach, 3 E. D. Smith, 337.

newspaper, for libel in charging that the affairs of the company were mismanaged, it was alleged that the words were published of and concerning the company in their business, and of and concerning the directors of the company, and of and concerning the president, vice-president and secretary of the company, and of and concerning the property and concerns of the company, and of and concerning the conduct and management of the property and concerns of the company by the aforesaid directors and officers of the company; and special damage was charged to have resulted to the company in a loss of its business, and a diminution of its profits. On demurrer to the complaint, it was held that "a corporation aggregate may maintain an action for a *libel* for words published of them concerning their trade or business, by which they have suffered special damage." And that, "in alleging special damage, it is not always necessary to name the customers whose business has been lost by the defamation; but if the nature of the business is such as to render that impracticable, the loss of the business may be alleged generally."[1] In another case it was held that a joint stock company, incorporated under the statute 19 and 20 Vict., ch. 47, might maintain an action for libel, and that, too, against a shareholder in the company.[2] And in that case it was said there may be particular kinds of libel which do not effect a corporation, but if injury ensues an action may be maintained. Where the defendant published in a periodical, that the plaintiff, an incorporated bank, "was liable at any time to be closed up by an injunction," the plaintiff brought an action for libel, alleging that since the publication divers persons had refused to receive the notes of the plaintiff, and had refused to deal with it. To this complaint there was a demurrer; the demurrer

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[1] Trenton Ins. Co. *v.* Perrine, 3 Zab. 402.

[2] Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 Hur'l. & Nor. 87.

was overruled, and it was held that a good cause of action was alleged without any allegation of special damages that the law recognized the rights of a corporation to its property as effectually as in the case of an individual. An appeal was taken to the general term, where the decision was affirmed.[1] Where an act of Parliament, after reciting the difficulties experienced by joint-stock companies in suits for recovering debts and enforcing obligations, and in the prosecution of offenders, enacted that actions commenced by the Hope Company for recovering debts, enforcing claims or demands then due, or which thereafter might become due or arise to the company, might be commenced, and indictments for offenses be preferred, in the name of the chairman. Held, that the chairman might sue for a libel on the company, although it was not a corporate body.[2]

§ 265. As a corporation can act only by or through its officers or agents (§ 261), and as there can be no agency to slander (§ 67),[3] it follows that a corporation cannot be guilty of slander; it has not the capacity for committing that wrong. If an officer or an agent of a corporation is guilty of slander, he is personally liable, and no liabilty results to the corporation. But as all concurring in the authorship or publications of a libel are alike responsible as publishers (§§ 115, 117, and note 3, p. 148), there is nothing to prevent a corporation from being, *in law*, the publisher of a libel, and from being held liable as such publisher. A corporation may sanction the publication of a libel, and, in such a case, the corporation is the publisher of the libel, and liable in like manner as

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[1] Shoe and Leather B'k *v.* Thompson, 18 Abb. Pra. R. 413.

[2] Williams *v.* Beaumont, 10 Bing. 260; 3 M. & Sc. 705; and see Woodward *v.* Cotton, 1 Cr. M. & R. 44.

[3] Moloney *v.* Bartley, 3 Camp. 210; Hecker *v.* DeGroot, 15 How. Pra. R. 314; and note 1, p. 111, *ante*.

an individual; not because, as is sometimes said, a corporation may act with malice, but because it has a capacity for voluntary action, and is responsible for such action. It is as possible for a corporation as for an individual to act maliciously, *i. e.* with a bad intent. Accordingly it has been held, that a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as would imply malice, in law, sufficient to support the action; and there may be circumstances by which express malice in fact might be proved, such as to make a corporation aggregate liable therefor in its corporate capacity.[1]

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[1] Whitfield *v.* South-East. R. R. Co. 1 Ell. B. & E. 115; Aldrich *v.* Press Printing Co., 9 Min. 133; Alexander *v.* N. East. R. R. Co., 34 Law Jour. Rep. N. S. 152; Q. B.; 11 Jurist, N. S. 619. Exemplary damages against a corporation. (Jefferson R. R. *v.* Rogers, 28 Ind. 1.)

PART II.

REMEDY BY ACTION

FOR THE WRONGS CALLED

SLANDER AND LIBEL.

CHAPTER XI.

PROCEEDINGS IN AN ACTION.

Action, how commenced—Within what time—In what court—Attachment—Holding defendant to bail—Execution against the person—Security for costs—Consolidating action—Place of trial—Inspection and discovery—Assessment of damages where no answer interposed—Mode of trial—Struck jury—Refusing to try—Compromise—Right to begin—Address of counsel—Reading libel to jury—Evidence for plaintiff—Abandonment of one of several causes of action or defense—Province of the court and jury—Damages—Verdict—New trial—Costs—Staying proceedings until costs of former action paid.

§ 266. The preceding chapters of this essay have been devoted to a consideration of *the law* relating to the wrongs called slander and libel. We have now to treat of *the remedy by action* for these wrongs. The diversity of the procedure in the courts of the several States, renders it impossible to compress within any convenient space, or into any convenient form, the practice, pleadings, and proceedings in actions in all the States. To trace in detail the whole proceedings in an action in any one State, would be to exceed the limits of our subject. We purpose, therefore, to exhibit so much of the course of procedure in an action in the courts of the State of New York, as applies either exclusively to the action of slander or libel, or as may have been adjudicated upon. Our remarks, while they will more particularly refer to the State of New York, will occasionally extend to other States and to the practice in the courts of England. As the Code of

Procedure of the State of New York has been the model for the Codes of Procedure of other States, references to the Code of New York will have a wide field of practical utility. The topics of *Parties*, *Pleading*, and *Evidence* will be considered in subsequent chapters.

§ 267. The action for slander or libel is commenced by summons, in the form known as a summons for relief. The summons may be served by publication.[1] The action must, with certain exceptions, be commenced within two years of the time of the publication, and within the lifetime of the person affected by the defamatory matter;[2] it cannot be brought in a court of a justice of the peace.[3] It may be brought in the Marine Court of the City of New York, if the damages *claimed* do not exceed $500. And in cases which might be brought in the Marine Court, if the action is brought in any other court, the plaintiff can recover only Marine Court costs.[4] The plaintiff in an action for slander or libel cannot issue an attachment against the property of the defendant,[5] but the defendant, whether male or female, may be arrested and held to bail at the commencement of the action, or at any time before judgment therein;[6] and after the return un-

[1] Code of Pro., § 135; see Waterhouse *v.* Hatfield, 9 Ir. L. R. 38.

[2] Code of Pro., § 93; see *post*, *Parties*. In some cases in England, the plaintiff must give notice of action. (See Norris *v.* Smith, 10 A. & E. 190; Beechey *v.* Sides, 9 B. & C. 806; Lidster *v.* Borrow, 9 A. & E. 654.)

[3] Code of Pro., § 54. Actions for libel and slander are excepted from the jurisdiction of the County Courts in England, 9 and 10 Vict., ch. 95; 12 and 13 Vict., ch. 101; 13 and 14 Vict., ch. 61; 15 and 16 Vict., ch. 54.

[4] Laws of N. Y. 1853, p. 1165; Murray *v.* De Gross, 3 Duer, 668. Any court of record in the city of New York may send any action of libel or slander pending in said court and at issue, to the Marine Court for trial. (See Laws 1871, p. 1817; Laws 1870, p. 1346.)

[5] And so in So. Carolina, Sargent *v.* Helmbold, Harper, 219.

[6] Code of Pro., §§ 179, 183. In England the holding to bail in an action for libel is of very rare occurrence. (Folkard, Stark. Slan. 548.) In New York city, the practice of holding to bail in actions for libel or slander is now discouraged by the courts. (See Knickerbocker Ins. Co. *v.* Ecclesine, 6 Abb. Pra. Rep. N. S. 9; Butts *v.* Burnett, *id.* 302.)

satisfied of an execution against the property of the defendant, an execution may issue against his person, even in the case of an infant defendant.[2] A married woman sued with her husband may be held to bail.[2] If the plaintiff fails in the action, a judgment against him for the costs may, after an execution against his property has been returned unsatisfied, be enforced by an execution against his person.[4] The plaintiff may be required to give security for costs, as in other actions.[5] Actions for slander or libel may be consolidated.[6]

§ 268. The actions of slander and libel are of the kind known as *transitory*.[7] The place of trial (the venue)

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[1] Code of Pro., §§ 179, 288; see Baker *v.* Swackhamer, 5 How. Pra. Rep. 251; Straus *v.* Schwarzwaelden, 4 Bosw. 627; Brooks *v.* McLellan, 1 Barb. 627; Davis *v.* Scott, 15 Abb. Pra. Rep. 127; Pearson *v.* Picket, 1 McCord, 472; Newton *v.* Rowe, 8 Sc. N. R. 26; Defries *v.* Davies, 3 Dowl. Pra. Cas. 629. A defendant in custody on an execution for damages in slander or libel, is not discharged therefrom by the English bankrupt law; see 1 Doria & McCreas' Law of Bankruptcy, 349. Query as to the United States Bankrupt Law.

[2] Defries *v.* Davies, 3 Dowl. 629. The defendant in an action for slander, aged 15 years, was taken in execution for the damages and costs, and the court refused to release him. (*Id.*)

[3] Schaus *v.* Putscher, 25 How. Pra. Rep. 436.

[4] Kloppenburg *v.* Neefus, 4 Sandf. 655.

[5] Court refused to increase amount of security to cover expenses of foreign witnesses. (Pizani *v.* Lawson, 5 Sc. 418.) By statute 30 and 31 Vict. ch. 142, § 10, it is enacted that in actions of malicious prosecution, * * * * slander, seduction, or other action of tort brought in a superior court, the plaintiff may be required to give security for costs, or satisfy a judge that he has a cause of action, otherwise the action is to be remitted to the county court.

[6] See an instance, Whitely *v.* Adams, 15 C. B. N. S. 392; 10 Jurist, N. S. 47. The court refused to consolidate actions for the same libel, one against the publisher and the other against the editor of the newspaper in which the libel was published. (Cooper *v.* Weed, 2 How. Pra. Rep. 40.) Where A and B having recovered in separate actions against different parties engaged in the publication of the newspaper in which the libel was published, commenced other actions against the same parties, each suing the party against whom the other had recovered, the court, on motion, refused to stay the proceedings in the second actions. (Martin *v.* Kennedy; Bunning *v.* Perry, 2 Bos. & Pul. 69. See Jones *v.* Pritchard, 6 Dowl. & L. 529; 18 Law Jour. 104, Q. B.)

[7] Hull *v.* Vreeland, 42 Barb. 543; Owen *v.* McKean, 14 Ill. 459; Teagle *v.* Deboy, 8 Blackf. 134; and see Wickham *v.* Baker, 4 Blackf. 517, *ante*, § 110, and *note*, p. 145.

should be the county in which the parties, or some of them, reside; or if none of the parties reside in the State, then in any county the plaintiff may designate,[1] subject in every case to the power of the court to change the place of trial.[2]

§ 269. In certain cases, either party is entitled to the production and inspection of documents in the possession or control of his adversary.[3] Where, in an action for a libel, the plaintiff moved for an order upon the defendant to deliver to him a copy of a printed book in his, defendant's, possession, in order to enable him, plaintiff, to prepare his complaint in the action, *per curiam:* Without expressing any opinion as to the propriety of compelling a defendant, in an action for a libel, to deliver to the plaintiff a copy of the libel, I am clearly of the opinion that this motion should not be granted, because: 1. The

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[1] Code of Pro., § 125. Formerly it was a ground for arresting or setting aside the judgment if the *venue* was laid in the wrong county. This was altered by the statutes 16 and 17 Car. 2, ch. 8; 4 Anne, ch. 16; Clerk *v.* James, Cro. Eliz. 870; Craft *v.* Boite, 1 Saund. 241.

[2] Code of Pro., § 126. As to changing *venue*, see Phillips *v.* Chapman, 5 Dowl. Pr. Cas. 250; Ryder *v.* Burke, 10 Ir. Law. Rep. 476; Robson *v.* Blackman, 2 Dowl. 645; Clements *v.* Newcombe, 1 Cr. M. & R. 776; 3 Dowl. Pr. Cas. 425; Pybus *v.* Scudamore, 7 Sc. 124; Hobart *v.* Wilkins, 1 Dowl. 460; Wheatcroft *v.* Mouseley, 11 C. B. 677; Pinckney *v.* Collins, 1 T. R. 571; Clissold *v.* Clissold, 1 T. R. 647; Metcalf *v.* Markham, 3 T. R. 652; Barnes *v.* Holloway, 8 T. R. 150; Hitchon *v.* Best, 1 B. & P. 299; Lucan *v.* Cavendish, 10 Ir. Law Rep. 536; Callagher *v.* Cavendish, 3 Ir. Law Rep. 375; Root *v.* King, 4 Cow. 403; Shaftsbury's case, 1 Vent. 364; Greenslade *v.* Ross, 3 Dowl. Pra. Cas. 697; Tallent *v.* Morton, 1 M. & P. 188.

Where the application is on special grounds, it should not be made until after issue joined. (Hodge *v.* Churchyard, 5 C. B. 495; Griffin *v.* Walker, 7 Sc. 846.) The *venue* changed after a nonsuit (Price's notes, P. of Pr. 177). It was held no ground for changing the *venue* in an action for libel published in a local newspaper, that the defendant, the proprietor of the paper, possessed much influence in the county in which the *venue* was laid, and had, since the commencement of the action, evinced a disposition to use it to the prejudice of the plaintiff. But the court intimated that they would interfere if the defendant should before the trial publish anything in relation to the matter of the action reflecting upon the plaintiff. (Walker *v.* Brodgen, 17 C. B. N. S. 571.)

[3] Code of Pro., § 388; 2 Rev. Stat. of N. Y. 199; Court Rule 14. And under the English Common Law Procedure Act. (Collins *v.* Yates, 27 Law Jour. 150, Ex.)

affidavits do not show what is stated in the book of which the plaintiff seeks a discovery, and therefore the court cannot decide whether it is material or not. 2. Because the affidavits do not specify any particular information desired, so that the court could order a sworn copy to be delivered. 3. Because plaintiff is not entitled to the whole book, but only to the particular article on which his action is founded.[1] Upon an application in an action for libel, for leave to examine a defendant before service of any complaint, the court much doubted the propriety of exercising the power of the court to enable the plaintiff to obtain facts upon which to frame his complaint.[2] And in an action against certain individuals named, and certain others not named (except by fictitious names), for a libel in a newspaper of which the defendants named, with the others not named, were alleged to be the proprietors, the plaintiff alleged that the names of the proprietors were unknown to him, and that it was pretended that the newspaper was the property of a corporation, and asked for an inspection of the books of such corporation to enable him to ascertain the true names of the proprietors of the newspaper. The application was denied.[3]

§ 270. In England a bill of discovery is allowed in certain cases in an action for libel,[4] and interrogatories may be exhibited to ascertain the precise words used,[5] but

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[1] Lynch *v.* Henderson, 10 Abb. Pra. R. 345, *note.*

[2] Keeler *v.* Dusenbury, 1 Duer, 661.

[3] Opdyke *v.* Marble, 44 Barb. 64.

[4] By statute 6 & 7 W. IV, ch. 76, § 19, authority is given to file a bill of discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper in order to bring or carry on any suit for libel. As to a bill of discovery in aid of an action for libel, see Macauley *v.* Shackell, 1 Bli. N. S. 96; 2 Sim. & St. 79; Wilmot *v.* McCabe, 4 Sim. 263; March *v.* Davison, 9 Paige, 580; Stat. 32 George III, ch. 60; Stewart *v.* Nugent, 12 Legal Observer (London), 210.

[5] Atkinson *v.* Fosbrook, Law Rep. 1, 628, Q. B.; 14 Law Times, N. S. 553; 17 & 18 Vict. ch. 125; 32 & 33 Vict. ch. 24.

the court refused to permit a plaintiff to exhibit interrogatories to the defendant, the answers to which, if in the affirmative, would tend to show that he composed or published the libel, and would therefore criminate him.[1] In an action for imputing to the plaintiff that he was the author of a scandalous letter, which the defendant in his plea justified as true, the court allowed the plaintiff an inspection of the letter by certain witnesses, in order that he might be prepared to negative its being his handwriting.[2]

§ 271. In one case,[3] in an action for libel, the court ordered the defendant to produce certain documents in his possession for the inspection of the plaintiff. This was disapproved of in a subsequent case,[4] where an application for an order to inspect the manuscript of articles that had been published in a newspaper was denied. A motion to compel the defendants to declare to whom the defamatory matter was intended to apply was denied.[5]

§ 272. On the principle that before a party utters a slander he should be prepared to justify, it has been said that the courts will not give the defendant an inspection of documents in the possession of the plaintiff to enable the defendant to prepare a plea in justification; thus where A. charged B. with forging an I O U, and B sued

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[1] Tupling *v.* Ward, 6 Hurl. & Nor. 749; Edmunds *v.* Greenwood, Law Rep. IV, C. P. 70; but see Baker *v.* Lane, 3 Hurl. & Colt. 544; 34 Law Jour. N. S. 57, Ex.; 10 Jurist, N. S. 117; 11 Law Times, N. S. 38, as explained in Beckford *v.* D'Arcy, Law Rep. 1, 354, Ex.; 14 Law Times, N. S. 629; see also Stern *v.* Sevastopulo, 14 C. B. N. S. 737; Moor *v.* Roberts, 2 C. B. N. S. 671; Bartlett *v.* Lewis, 12 C. B. N. S. 249. Publisher may refuse to answer interrogatories (Bowden *v.* Allen, 22 Law Times, N. S. 342; 39 Law Jour. 217, C. P.) When court will not review order allowing an interrogatory (Inman *v.* Jenkins, 39 Law Jour. 258, C. P.); and as to interrogatories see Osborne *v.* London Dock Co., 10 Ex. 698; Chester *v.* Wortley, 17 C. B. 410.

[2] Curtis *v.* Curtis, 3 M. & Sc. 819.

[3] Perrott *v.* Morris, 8 Irish Jurist, 334.

[4] Findlay *v.* Lindsay, 7 Irish Com. Law Rep. 1.

[5] Giraud *v.* Beach, 3 E. D. Smith, 337.

A. in slander for uttering such charge, the court refused the application of the defendant for an inspection of the I O U, although he alleged that the I O U was in the possession of the plaintiff, that he (defendant) had reason to believe it was in reality a forgery, and that he could not safely plead without inspecting it.[1] Where an order had been made in an action of libel, giving the defendant leave, under 14 and 15 Vict. ch. 99, § 6, to inspect the books of the plaintiff, a motion by the defendant to extend the time to make the inspection, was denied on the ground that the order for inspection ought never to have been made, and *per curiam.* A man who publishes a libel should be in a position to prove it, and it would be a monstrous thing if a man could publish a libel, imputing insolvency to a mercantile house, and then to come to this court and ask for an order to inspect the plaintiff's books, in the hope of being able to get up a case. If the defendant is a shareholder, he has other means of obtaining an inspection, and we can only regard him as a defendant in an action for libel.[2]

§ 273. In Massachusetts and in Maine, by statutes, a bill of particulars of the language which the plaintiff intends to prove may be ordered.[3] These are cases where the precise words alleged to have been published were not set forth in the complaint. (§ 329.) In England an order was made for a statement of the occasions upon which the words were published,[4] and for a bill of particulars as to the defense.[5] Where the declaration alleged as special

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[1] Day *v.* Tuckett, 1 Bail Court Rep. 203; but see Browning *v.* Aylwin, 7 B. & C. 204, where an inspection was allowed.

[2] Metro. Saloon Co. *v.* Hawkins, 4 Hurl. & Nor. 146; 1 Fost. & F. 413; see Steadman *v.* Arden, 15 M. & W. 587.

[3] Clark *v.* Munsell, 6 Metc. 373; True *v.* Plumbey, 36 Maine (1 Heath), 466.

[4] Slator *v.* Slator, 8 Law Times, N. S. 856; and see Wicks *v.* Macnamara, 36 Law Jour. 419, Ex.; Early *v.* Smith, 12 Irish Com. Law Rep. p. xxxv of Appendix.

[5] Wren *v.* Weild, Law Rep. IV, Q. B. 213; Jones *v.* Bewicke, Law Rep. V, C. P. 32.

damages, which was essential to the maintenance of the action, that certain persons had, in consequence of the alleged slander, refused her pecuniary assistance or their votes for her admission into a benevolent institution, an application by the defendant for particulars of the names of the persons to whom the publication was made, was denied, but interrogatories were allowed as to the names of the parties whose patronage plaintiff alleged she had lost.[1]

§ 274. If the defendant does not answer, he admits the allegations of the complaint and the truth of the innuendoes.[2] The plaintiff must issue a writ of inquiry, and have his damages assessed by a sheriff's jury, not by a referee.[3] The court may order the writ of inquiry to be executed before a judge.[4] On the execution of the writ, the plaintiff is not required to give any evidence of publication.[5] The defendant, on the execution of the writ, will not be allowed to read parts of the publication not set forth in the complaint, in order to give a meaning to the words set forth in the complaint different from that alleged by the plaintiff;[6] and semble, the defendant will not be allowed to give evidence of the truth of the language complained of.[7]

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[1] Wood *v.* Jones, 1 Fost. & F. 301.

[2] Code of Pro. §§ 168, 246; Tillotson *v.* Cheetham, 3 Johns. 56. After judgment by default, it is too late to object to the *venue*. (Wickham *v.* Baker, 4 Blackf. 517.)

[3] Voorhies' Code, p. 359, 10th ed.; and see Schewer *v.* Kleine, 15 La. Ann. 303.

[4] Casneau *v.* Bryant, 6 Duer, 668; and see Dillaye *v.* Hart, 8 Abb. Pra. Rep. 394; Hays *v.* Berryman, 6 Bosw. 679.

[5] Tripp *v.* Thomas, 3 B. & Cr. 427; 5 D. & R. 276; 1 Carr. 477. In this case it was also held, that although the plaintiff gives no evidence, the jury are not limited to giving nominal damage, It has been held that after assessment of damages on a writ of inquiry, the plaintiff cannot, without leave of the court, enter a *nolle prosequi* as to one count, and take judgment for the others. (Backus *v.* Richardson, 5 Johns. 476.)

[6] Tillotson *v.* Cheetham, 3 Johns. 56.

[7] Lewis *v.* Few, Anthon, 75. Held not sufficient ground for staying a writ of inquiry that the House of Commons had voted the publication privileged. (Stockdale *v.* Hansard, 8 Dowl. 148.) In Beatson *v.* Skene, 5 Hurl. & N. 839, an order was

§ 274 *a*. In Macaulay *v.* Shackell,[1] Lord Elden, on a bill in chancery, granted a commission for an examination of witnesses abroad for the purpose of proving a plea justifying the truth of an alleged libel, with an injunction till the return of the commission. It was considered an extraordinary stretch of his authority, but subsequently the common-law courts have adopted the practice, where the facts warrant it, of issuing a commission with a stay of proceedings. We remember one case, against the proprietor of the London Times newspaper, where the court stayed the proceedings for eighteen months, and gave the defendant an open commission to take the depositions of all or any persons in any part of the world.

§ 274*b*. Where in an action for libel or slander a cause is compromised by the defendant agreeing to apologize and pay plaintiff's costs, as between attorney and client, the court will by rule enforce performance of the agreement,[2] unless defendant shows that he is unable to perform the stipulation on his part.[3]

§ 275. The trial of the issues in an action for slander or libel must be by jury, unless a jury trial is waived, or the parties, by consent, try the issue before the court

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made permitting the defendant to inspect and take copies, by photograph or otherwise, of the alleged libels. The cost of taking copies, in such a case, is to be borne by the party requiring them, but the costs of an order for inspection are in general costs in the cause. (Davey *v.* Pemberton, 11 C. B. N. S. 629.)

[1] 1 Bligh, N. S. 96. That case was affirmed on appeal in the House of Lords, when the chancellor said he had received an anonymous letter "assuring him that all the men of eminence at the bar thought this decision wrong, and that it is produced by the affection which the chancellor is supposed to have had for *some* Mr. Shackell." See Campbell's Lives of the Chancellors, X, ch. ccxiii, p. 246. In Brown *v.* Murray, 4 D. & R. 830, the court put off a trial to enable defendant to procure the attendance of witnesses from a foreign country to prove a justification, but imposed the terms that upon the trial the defendant should admit the publication of the alleged libel.

[2] Riley *v.* Byrne, 2 B. & Ad. 779; Tardrew *v.* Brook, 5 B. & Ad. 880.

[3] Clare *v.* Blakesley, 8 Dowl. 835.

without a jury, or before a referee, or submit to an arbitration.[1] In case of a trial by jury, the court may order a struck jury, but will not do so in trials to be had in the city of New York.[2] The court may refuse to try the cause if the trial will involve an attack upon the chastity of a third person not a party to the action.[3] In case of a new trial, the re-trial may be before the judge who presided on the first trial.[4]

§ 276. It is supposed that in actions for slander or libel, the plaintiff has, in every case, the right to begin.[5] The right to begin is so far within the discretion of the court, that an erroneous ruling in respect to it will neither entitle to a new trial nor render the judgment voidable by appeal.[6] But in England it has been held that an

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[1] Code of Pro. § 253. Instances of actions for slander and libel being referred. (Bonner *v.* McPhail, 31 Barb. 106; Rockweller *v.* Brown, 36 N. Y. 207; Perkins *v.* Mitchell, 31 Barb. 461; Sanford *v.* Bennett, 24 N. Y. 20) arbitration, see Grosvenor *v.* Hunt, 11 How. Pra. Rep. 355; Grayson *v.* Meredith, 17 Ind. 357; Shepperd *v.* Watrous, 3 Car. 166.) An award about calling a butcher a bankrupt was referred to a trial at law, because of the excessiveness of the damages given on the award. (Cooper *v.* The Butcher of Croyden, 3 Ch. R. 76.) In 2 Vern. R. 251, it is said there was another reason besides the excessive damages for setting aside the award. That reason was the relationship of the arbitrator to one of the parties. See an award that defendant should make submission and acknowledge himself sorry for all trespasses and *words*. (Cartwright *v.* Gilbert, 2 Browl. 48.) As to amount of costs, where an action of slander was referred, and plaintiff recovered less than forty shillings damages. (Fream *v.* Sergeant, 8 Law Times, N. S. 467.

[2] Genet *v.* Mitchell, 4 Johns. 186; Thomas *v.* Rumsey, 4 Johns. 482; Thomas *v.* Crosswell, 4 Johns. 491; Nesmith *v.* Atlantic Mut. Ins. Co., 8 Abb. Pra. Rep. 423.

[3] Loughead *v.* Bartholomew, Wright, 90. As to right of judge to refuse to try a cause, see De Costa *v.* Jones, Cowp. 729; Squires *v.* Whisken, 3 Camp. 140; Ditchen *v.* Goldsmith, 4 Camp. 152; Brown *v.* Leeson, 2 H. Black. 43; Egerton *v.* Furzman, 1 C. & P. 613; Henken *v.* Guers, 2 Camp. 408.

[4] Fry *v.* Bennett, 3 Bosw. 200; 28 N. Y. 329.

[5] Littlejohn *v.* Greeley, 13 Abb. Pra. R. 41. See Wood *v.* Pringle, 1 Mo. & Rob. 277; Sawyer *v.* Hopkins, 9 Shep. 268; Huntington *v.* Conkey, 33 Barb. 218; Ayrault *v.* Chamberlain, 33 Barb. 233; Fountain *v.* West, 23 Iowa, 9; Carter *v.* Jones, 6 C. & P. 64; 1 M. & Rob. 281; Mercer *v.* Whall. 5 Q. B. 462; Hoare *v.* Dickson, 7 C. B. 164.

[6] Fry *v.* Bennett, 3 Bosw. 200; 28 N. Y. 329.

erroneous ruling as to the right to begin entitles the objecting party to a new trial.[1] And so in Alabama.[2]

§ 277. Counsel, in opening, should not state facts which they are not prepared to prove; but a disregard of this rule will not entitle the opposite party to disprove a statement of counsel.[3] Nor is a party limited in his proof to the opening of his counsel.[4] Counsel, in summing up, should confine themselves to the facts proved; but a disregard of this rule is not a ground for a new trial.[5] The summing up of counsel may, it seems, affect the damages. Thus, in an action for libel brought by an attorney, the defendant's counsel having ridiculed the profession, and assailed the character of the plaintiff, Lord Chief Justice Cockburn told the jury that if they thought it was a libel, and directed against the plaintiff, "a defense of that description is ten-fold, if not an hundred-fold, an aggravation of any libel which can be brought against a man for any departure from the propriety of his profession, * * * a most grievous aggravation, and one which it is your bounden duty to take into your serious consideration."[6]

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[1] Ashley *v.* Bates, 15 M. & W. 589; Booth *v.* Milnes, 15 M. & W. 669; 4 D. & L 52; 15 Law Jour. 354, Ex.; Doe *v.* Brayne, 17 Law Jour. 127, C. P.; 5 C. B. 655; Hinkman *v.* Firnie, 3 M. & W. 505; but see Brandford *v.* Freeman, 5 Ex. 734; Burrell *v.* Nicholson, 1 M. & Rob. 304; Bird *v.* Higginson, 2 A. & E. 160.

[2] Chamberlain *v.* Gaillard, 26 Ala. 504.

[3] Duncombe *v.* Daniell, 8 C. & P. 223.

[4] Nearing *v.* Bell, 5 Hill, 291.

[5] Fry *v.* Bennett, 3 Bosw. 202; 28 N. Y. 331.

[6] Note to Gfroever *v.* Hoffman, 16 U. C. Q. B. Rep. 445. Damages may be increased by what passes in court. (Darby *v.* Ouseley, 25 Law Jour. 227, Ex.) Aggravating damages by cross-examining the plaintiff as to the truth of the charge against him, and failing to establish the truth of the charge. (Rish Allah Bey *v.* Whitehurst, 18 Law Times, N. S. 615.) And where, on the trial of an action for slander, the plaintiff expressed his willingness to accept an apology and nominal damages, if the defendant would withdraw his plea of justification, the defendant refused this offer, and offered no evidence in support of his plea; the jury were directed to consider the nature of the imputation, how it had been made and persisted in down to the time of the verdict, and this direction was upheld. (Simpson *v.* Robinson, 12 Q. B. 513.)

§ 278. Where the publication is denied, the libel should not be read to the jury until after the plaintiff's counsel has called witnesses to prove the publication; but a disregard of this rule is not a ground for a new trial.[1] As a general rule, the defendant is entitled to have read on the trial, as a part of the plaintiff's case, the whole publication containing the alleged libellous matter,[2] or to have in evidence the whole conversation in which the alleged defamatory words were spoken, for he is entitled to show by the context that the alleged defamatory language was not used in a defamatory sense (§ 283). Where a letter of the defendant's was read, which referred to an account of the transaction in a newspaper, it was held that the newspaper was evidence;[3] and where the alleged libels were contained in certain newspapers, the plaintiff proposed to put in evidence and have read the alleged libellous articles only. For the defendant it was claimed that he was entitled to have the whole of the newspapers put in evidence, *as part of the plaintiff's case*, and to enable the defendant to call attention to certain matter published in the same papers with the said articles, and to which they referred. Cockburn, C. J., after consulting Blackburn, J., allowed the defendant's claim.[4] But where a paragraph

[1] Taylor *v* State of Georgia, 4 Geo. 14.

[2] Thornton *v.* Stephen, 2 M. & Rob. 45; Cooke *v.* Hughes, Ry. & M. 112; 2 Greenl. Ev. § 423; Rex *v.* Lambert, 2 Camp. 398; Rutherford *v.* Evans, 6 Bing. 451; 4 C. & P. 74. Papers referred to in a libel may be read in evidence in explanation, to give a construction to it. (Nash *v.* Benedict, 25 Wend. 645.) But the defendant cannot avail himself of previous publications to explain the libellous matter or mitigate the damages, unless he shows the plaintiff to be the author of such previous publications. (Haws *v.* Stanford, 4 Sneed (Tenn.) 520.) The whole libel must be considered in determining whether it applies to the plaintiff. (Cook *v.* Tribune Asso., 5 Bl. C. C. 352.) In the case of the essays and reviews, the Privy Council held that whilst "it is competent to the accused party to explain from the rest of his work the sense or meaning of any passage or word that is challenged by the accuser, the accuser is, for the purpose of the charge, confined to the passages which are included and set out in the articles as the matter of the accusation." (London Quarterly Review, April, 1864, Am. reprint, p. 284.)

[3] Weaver *v.* Lloyd, 2 Car. & P. 296.

[4] Hedley *v.* Barlow, 4 Fost. & F. 224.

in a subsequent number of a newspaper is given in evidence by the plaintiff, to prove malice, the defendant is not entitled to have read out of the same newspaper, as part of the plaintiff's case, other paragraphs having no reference to the one read by the plaintiff.[1]

§ 279. Where the defenses are a general denial and justification, the plaintiff may, before resting his case, either give all his evidence to defeat the justification,[2] or content himself by proving the allegations of his complaint only, in which case he will be restricted in his reply to such evidence only as goes exactly to answer the facts proved by the defense.[3] The evidence is usually closed with the plaintiff's rebutting testimony.[4] It is discretionary with the court to allow additional testimony on the part of either party after he has once closed;[5] and where there is a plea of justification, the plaintiff may, before resting his case, give evidence of express malice.[6] (§§ 388, 390, 392.)

§ 280. The plaintiff may, on the trial, abandon one or more of the causes of action he has alleged in his complaint,[7] or where the alleged defamatory matter is divisible, may withdraw a portion of the matter set forth in the complaint.[8] A defendant is not always allowed to withdraw a plea of justification,[9] but a refusal to allow such a with-

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[1] Darby *v.* Ouseley, 1 Hurl. & N. 1.

[2] Brown *v.* Murray, Ry. & Mo. 254; Ayrault *v.* Chamberlain, 33 Barb. 234; York *v.* Pease, 2 Gray, 282.

[3] Pierrepoint *v.* Sharpland, 1 Carr. 448.

[4] Teagle *v.* Duboy, 8 Blackf. 134.

[5] Wilborn *v.* Odell, 29 Ill. 456.

[6] Fry *v.* Bennett, 3 Bosw. 202; but see Winter *v.* Donovan, 8 Gill, 370.

[7] Kirkaldy *v.* Paige, 17 Verm. 256; Stow *v.* Converse, 4 Conn. 17; Gould *v.* Weed, 12 Wend. 12.

[8] Hesler *v.* Degant, 3 Ind. 501; Genet *v.* Mitchell, 7 Johns. 120.

[9] Clinton *v.* Mitchell, 3 Johns. 144; Lent *v.* Butler, 3 Cow. 370; Lee *v.* Robertson, 1 Stew. 138. Where the defendant, during a trial, withdrew a plea of justification, held that the plea could not be considered by the jury in aggravation. (Shirley *v.* Keatley, 4 Cold. (Tenn.) 29.)

drawal was in one case held error.[1] Where the defendant had pleaded the general issue and a plea of apology, leave to withdraw the plea of apology was denied, the plaintiff swearing he would be prejudiced.[2] It was held that a written statement made by the defendant, in which he disclaimed any evil intentions toward plaintiff, could not be given in evidence on the trial, and if allowed by the plaintiff to be given in evidence, could not be sent out with the jury.[3] Where the plaintiff, on the trial, abandons a part of the defamatory matter, the part abandoned may be referred to, to show the meaning of the part retained.[4]

§ 281. The jury are to determine, as a question of fact, the customary meaning of a word,[5] and the meaning of doubtful words,[6] and whether the language was or was not ironical.[7] "Where words are capable of two constructions, in what sense they were meant is a question of fact

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[1] Fitzgerald *v.* Ferguson, 25 Ill. 138. In Pennsylvania the withdrawal of the plea is within the discretion of the court. (Rush *v.* Cavanagh, 2 Barr, 187.)

[2] Sullivan *v.* Lenihan, 7 Irish Law Rep. 463.

[3] Hamilton *v.* Glenn, 1 Penn. St. Rep. 340.

[4] Genet *v.* Mitchell, 7 Johns. 120.

[5] Law *v.* Cross, 1 Black U. S. Rep. 583. See Edsall *v.* Brooks, 3 Robertson, 284; Barnett *v.* Allen, 1 Fost. & F. 125; Wachter *v.* Quenzer, 29 N. Y. 547. It is for the court to construe words in the English language (Barnett *v.* Allen, 36 Law Jour. 412, Ex.); and per Bramwell, J.: "Either the word is a known word in the language, in which case we must construe it, or it is a cant slang phrase, the meaning of which is a matter of fact. (*Id.*; and see *ante*, note 2 p. 169, and *post*, § 286.) Where the words are capable of only one meaning, their construction is a question for the court, but where they are capable of two meanings, or are of doubtful signification, it is the province of the jury to decide in what sense they were used. (Calkins *v.* Wheaton, 1 Edmonds' Rep. 229, citing Goodrich *v.* Woolcott, 3 Cow. 231; 5 Cow. 714.) The quality of a libellous publication is a question for the court. (Pittock *v.* O'Neill, 63 Penns. 253.)

[6] Hays *v.* Brierly, 4 Watts, 392.

[7] Reg. *v.* Browne, Holt, 425; 11 Mod. 86; Andrews *v.* Woodmansee, 15 Wend. 232; Boydell *v.* Jones, 4 M. & W. 446; 7 Dowl. Pra. Cas. 210. Where the court charged the jury that if the words were spoken "jocularly," the defendant was entitled to a verdict, and the jury having found for the defendant, the court granted a new trial without costs, and on plaintiff stipulating to abandon the action. (Donoghue *v.* Hayes, Hayes' Ir. Ex. Rep. 265.)

to be decided by the jury."[1] Thus, if in one sense the language imputes a crime, and in the other sense does not, the jury are to say in which sense the language is to be understood.[2] And where A. said to B., "You have killed one negro and nearly killed another," held that the jury were to say whether the words were used in a defamatory sense or not;[3] so where the language was, "You are a thief. You stole hoop-poles and saw-logs from D. and M.'s land," held that it was properly left to the jury to decide if the charge was taking timber or hoop-poles already cut—which was a felony—or with cutting down and carrying away timber to make hoop-poles, which was a trespass.[4] Where words apparently charging a crime are published, it is proper to instruct the jury that the words are actionable if uttered with intent to charge the crime.[5]

§ 282. Where the plaintiff, in an action for libel, had set out in his declaration an article published by the de-

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[1] 1 Stark. Slan. 60; Van Vechten *v.* Hopkins, 5 Johns. 221; Dexter *v.* Taber, 12 *Id.* 240; McKinley *v.* Rob, 20 *Id.* 356; Gorham *v.* Ives, 2 Wend. 534; Gibson *v.* Williams, 4 Wend. 320; Blaisdell *v.* Raymond, 14 How. Pra. Rep. 265; Bennett *v.* Williamson, 4 Sandf. 60. Where the words impute that the plaintiff, a reputed married woman, is the wife of another man, it is for the jury to say whether the defendant does or does not mean she has been guilty of bigamy. (Heming *v.* Power, 10 M. & W. 564. Where the words were, I have got a warrant for Tempest (the plaintiff); I will advertise a reward to apprehend him, and shall transport him for felony, Lord Ellenborough left it to the jury to say whether defendant spoke with reference to the warrant which had been improvidently issued. or meant to impute a charge of felony. (Tempest *v.* Chambers, 1 Stark. Cas. 67.) Where the words were, A. & B. have closed their accounts with you, and are going to shut you up—innuendo that plaintiff was insolvent, or likely to be so—left to the jury to say if such was the meaning. (Gostling *v.* Brooks, 2 Fost. & F. 76.)

[2] Cregier *v.* Bunton, 2 Rich. 395; 11 Humph. 507; *ex-parte* Bailey, 2 Cow. 479; and see 1 Amer. Lead. Cas. 153; Davis *v.* Johnson, 2 Bailey, 579; Welsh *v.* Eakle, 7 J. J. Marsh. 424, Lucas *v.* Nichols, 7 Jones' Law (N. Car.), 32; Snyder *v.* Andrews, 6 Barb. 47; Thompson *v.* Grimes, 5 Ind. (Porter) 385; Smith *v.* Miles, 15 Verm. 215; Usher *v.* Severance, 2 App. 9; Turrill *v.* Dolloway, 26 Wend. 383; Jones *v.* Rivers, 3 Brevard, 95.

[3] Hays *v.* Hays, 1 Humph. 402; Chalmers *v.* Payne, 2 C. M. & R. 156.

[4] Dexter *v.* Taber, 12 Johns. 239; and Stockdale *v.* Tarte, 4 Adol. & El. 1016; Tuson *v.* Evans, 3 Perr. & D. 396.

[5] St. Martin *v.* Desnoyer, 1 Min. 156.

fendant in a newspaper, which the plaintiff claimed to be libellous, and, on the trial, the defendant selected a certain portion of the words of such article, which he claimed were proved to be true, and if otherwise, were not libellous, and so he prayed the court to instruct the jury; the court, after defining a libel, and pointing out what would constitute one, instructed the jury that they might consider the whole libellous matter in connection with the circumstances proved or admitted, and say what was the meaning of the writing—what it imputed to the plaintiff as to motives, objects, principles, acts, and character; and if they were such as to make the writing libellous according to the definition previously given, and it was false and malicious, they would find the matter libellous, and sufficient to sustain the action; it was held that this direction was unexceptionable.[1] A banker, remitting the proceeds of a note sent to him for collection, appended to his letter the words, "Confidential. Had to hold over for a few days for the accommodation of L. & H.," who were the makers. Held that these words have not necessarily an injurious meaning, and that their interpretation was a matter for the jury.[2] Where the libel was copied by the defendants from another paper, with the word "fudge" added thereto, held that it was for the jury to say with what motive the publication was made, and whether that word was only to give a color at a future day.[3]

§ 283. Where, at the time of speaking defamatory words, the defendant qualifies them by other words, the jury are to determine from all that took place at the time, whether a crime was or was not charged; but to justify the application of this principle, the qualification or

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[1] Graves *v.* Waller, 19 Conn. 90.

[2] Lewis *v.* Chapman, 16 N. Y. 369; and see Simmons *v.* Morse, 6 Jones' Law (N. Car.), 6.

[3] Hunt *v.* Algar, 6 C. & P. 245.

explanation must not only accompany the words, but must be sufficiently explicit to enable those who hear the same, and who are presumed to acquire all their knowledge of the transaction from what was said at the time, reasonably to understand to what the words refer, and that the meaning which the words standing alone would convey was not the meaning intended.[1]

§ 284. It is for the judge to decide whether the language is capable of the meaning ascribed to it by the innuendo, and for the jury to decide whether such meaning is truly ascribed.[2] . Thus where the defamatory matter was concerning K., which it was alleged meant King George the Third, held that the jury was to decide if such was its meaning.[3] The judge may give his opinion that the publication complained of conveys a certain meaning, and that therefore it is libelous, but still it is for the jury to say whether or not the publication does convey the meaning which the judge ascribes to it.[4] Where the words were that the plaintiff "will lie, cheat, steal and swear," it was held that the court might, in answer to a broad request of the defendant's counsel to charge that the evidence did not support the declaration, say to the jury that these words might import that the plaintiff stole.[5] The plaintiff, D., who had worked for F. in making pill boxes by a machine owned and kept secret by F., left F., and set up a machine for making similar boxes on his own account. F., when speaking of D.'s said machine, said, "D. stole my

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[1] Van Akin *v.* Caler, 48 Barb. 60. See § 134.

[2] Blagg *v.* Sturt, 10 Q. B. 899; 16 Law Jour. 39, Q. B.; 11 Jur. 101; Cooper *v.* Greeley, 1 Denio, 361; Vanderlip *v.* Roe, 23 Penn. St. R. 82; Barger *v.* Barger, 18 Penn. St. R. 489; Hemmings *v.* Gasson, 1 Ell. B. & E. 346; Justice *v.* Kirlin, 17 Ind. 588; Wakelin *v.* Norris, 2 Fost. & F. 26; Pittock *v.* O'Neill, 63 Penns. 253; Gostling *v.* Brooks, 2 Fost. & F. 76.

[3] Rex. *v.* Woodfall, 5 Burr. 2661.

[4] Empson *v.* Fairford, W. W. & D. 10; 1 Jurist, 20.

[5] Dottarer *v.* Bushey, 16 Penn. St. R. 204.

patterns to get up his castings by." Held, that it was for the jury, and not for the court, to decide whether F. intended, by these words, to charge D. with the crime of larceny.[1] The alleged libel stated that plaintiff had, under certain specified circumstances, been surety for another, and then asked the question why he had become such surety, and answered by saying: There could be but one answer—he was hired for the occasion. It was left to the jury to say if this was a fair comment, and if so to find for defendant. The jury found for defendant; and on motion for a new trial, the court, although of opinion that the charge of being hired was not a just inference from the facts stated, held that the question had been correctly submitted to the jury, and refused to disturb the verdict.[2] Where the charge was "I have a suspicion that you have robbed my house," innuendo that plaintiff had stolen certain goods of the defendant, held that it was properly left to the jury to say whether the defendant meant to impute an absolute charge of felony, or only a suspicion of felony.[3] In an action of slander, the words laid did not, in express terms, charge the crime, which, by innuendo, it was stated the defendant meant to impute to the plaintiff, and there was no inducement showing of what the words were spoken; the circuit judge charged, that the declaration would suffice if the jury believed that the words would well carry the meaning that had been ascribed to them. Held, that such charge was proper, and a verdict for the plaintiff was sustained.[4]

§ 285. Whether the facts charged in the publication are true, is a question for the jury.[5] Where the charge

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[1] Dunnell *v.* Fiske, 11 Metc. 551.

[2] Cooper *v.* Lawson, 8 Adol. & El. 746.

[3] Tozer *v.* Mashford; 6 Ex. 539; 20 Law Jour. Rep. N. S. 224, Ex.; see §163, *ante.*

[4] Marshall *v.* Gunter, 6 Rich. 419.

[5] Thomas *v.* Crosswell, 7 Johns. 264; Van Vechten *v.* Hopkins, 5 Johns. 211.

was that plaintiff had traitorously betrayed the secrets of his government, it was held to be a question for the jury to say if he had *traitorously* betrayed the secrets of his government.[1] And where the charge was that the plaintiff was a *great* defaulter, and the proof was that he was a defaulter, held that it was for the jury to say whether he was a *great* defaulter.[2] And leaving it to the jury whether or not the defendant had made a true statement of a judicial proceeding, was held to be proper.[3]

§ 286. Where the language published is unambiguous (§ 126) it is the exclusive province of the court to determine its construction, and to determine whether or not upon its face it is actionable *per se*,[4] or concerning the plaintiff in his professional character.[5] But the court will not withhold the case from the jury unless it can plainly see upon the face of the record that the matter charged cannot in any way be libellous.[6] On not guilty pleaded, whether the defamatory matter was published concerning the plaintiff, or whether by the person mentioned the plaintiff was intended, is a question of fact for the jury.[7] Where the declaration alleged the publication of a certain "libel concerning the plaintiff," but contained no innuendo, colloquium, or inducement to connect the publication with

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[1] Genet *v.* Mitchell, 7 Johns. 90.

[2] Warman *v.* Hine, 1 Jurist, 820.

[3] Huff *v.* Bennett, 4 Sandf. 120.

[4] Reeves *v.* Templar, 2 Jurist, 137; Matthews *v.* Beach, 5 Sandf. 256; Green *v.* Telfair, 20 Barb. 11; Fry *v.* Bennett, 5 Sandf. 54; Haight *v.* Cornell, 15 Conn. 74; Mix *v.* Woodward, 12 Conn. 262; Thompson *v.* Grimes, 5 Ind. 385; McKinley *v.* Robb, 20 Johns. 351; Archbold *v.* Sweet, 5 C. & P. 219; 1 Mo. & Rob. 162; see *ante*, § 281.

[5] Tomlinson *v.* Brittlebank, 1 Har. & W. 573.

[6] Fray *v.* Fray, 17 C. B. N. S. 603, and by the court in Teacy *v.* M'Kenna, 4 Ir. C. L. 374, in overruling a demurrer to the declaration, "It is enough that the court are not prepared to decide that this document is not capable of a construction in any reasonable sense that would make it a libel."

[7] Van Vechten *v.* Hopkins, 5 Johns. 211; Green v. Telfair, 20 Barb. 11; Godson *v.* Home, 1 Brod. & Bing. 7.

the plaintiff, and no evidence but the publication itself was offered to connect him therewith, it was held to be a question for the court, as a question of construction, to determine whether or not the publication referred to the plaintiff.[1] Where no extrinsic facts are offered in evidence, or if the language is ambiguous, the question of libel or no libel is, in a civil action, a question of law,[2] and as neither the statute of 32 George the Third, enabling the jury to give a general verdict in an action for libel, nor the similar provision in the Revised Statutes of New York, apply to civil actions,[3] the judge may charge the jury whether or not, as a question of law, a publication is libellous on its face,[4] and it is the duty of the jury to follow the instructions of the judge.[5] It is the practice for the judge first to give a legal definition of libel, and then to leave it to the jury to say whether the facts necessary to constitute that offense, have been proved to their satisfaction.[6] The judge may state under what circumstances language in itself actionable may be spoken with impunity, and by way of illustration put a case differing in some respects from that before the court.[7] He is bound, upon a proper

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[1] Barrows *v.* Bell, 7 Gray (Mass.) 301.

[2] Snyder *v.* Andrews, 6 Barb. 43.

[3] Hunt *v.* Bennett, 19 N. Y. 173; Levi *v.* Milne, 4 Bing. 195; Snyder *v.* Andrews 6 Barb. 55; Dollaway *v.* Turrell, 26 Wend. 399; Reeves *v.* Templar, 2 Jur. 137.

[4] Darby *v.* Ouseley, 1 Hurl. & N. 1; Wagaman *v.* Byers, 17 Md. 183; Hunt *v.* Bennett, 19 N. Y. 173.

[5] Hakewell *v.* Ingram, 2 Com. Law Rep. 1397; The State *v.* Jeandell, 32 Penn. St. Rep. 475; and see Duffy *v.* The People, 26 N. Y. 588; Rex *v.* Burdett, 4 B. & Ald. 131; 2 Bennett & Hurd Lead. Cr. Cas. 388; The State *v.* Croteau, 23 Verm. 14; U. S. *v.* Morris, 1 Curtis, 53; Baylis *v.* Lawrence, 11 Adol. & El. 925; Rex *v.* Dean of St. Asaph, 21 How. St. Tr. 847; 3 T. R. 428 note; Sixth Rep. of Crim. Law Comm'rs, A. D. 1841; Forsyth's Hist. of Trial by Jury, 268; 2 Camp. Ch. Justices, 478; 3 *Id.* 56; Rex *v.* Miller, 20 How. St. Tr. 892; Rex *v.* Woodfall, 5 Burr. 2661; Shattuck *v.* Allen, 4 Gray, 541; Com'wealth *v.* Anthes, 5 Gray, 185; Com'wealth *v.* Porter, 10 Metc. 263; Goodrich *v.* Davis, 11 Metc. 473; Com'wealth *v.* Abbott, 13 Metc. 120; Pearce *v.* The State, 13 N. Hamp. 536; The People *v.* Crosswell, 3 Johns. Cas. 337.

[6] Parmiter *v.* Coupland, 6 M. & W. 105; Cox *v.* Lee, Law Rep. IV, Ex. 288.

[7] Taylor *v.* Robinson, 29 Maine, 323.

motion, to rule whether or not the declaration sets forth a cause of action.[1] But in charging the jury, the judge is not bound to give his opinion as to the nature of the publication as a matter of law.[2] And where the judge charged, "I find a difficulty in saying whether it (the publication) is a libel or not. Gentlemen, can you assist me?" a motion for a new trial on the ground of misdirection was denied.[3] But it is no misdirection that the judge, in addition to leaving the proper questions to the jury, stated his own opinion as to the libellous nature of the publication.[4] Although the judge is to leave it to the jury whether, under the circumstances, the publication is a libel, on the general issue guilty or not guilty, yet if they find a verdict for the defendant on that issue, in a case in which no question is made as to the fact of publication, nor as to its application to the plaintiff, the court will set aside the verdict.[5] And where the action was for calling the plaintiff a thief, and the defense was that the defendant so explained the words that the charge did not amount to an imputation of felony, the court being of opinion that the defense failed, charged the jury that the plaintiff was entitled to a verdict, and that the only question for them to determine was the amount of damages. The defendant excepted to this charge, and on appeal the charge was held to be proper.[6]

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[1] Shattuck *v.* Allen, 4 Gray (Mass.) 540; Matthews *v.* Beach, 5 Sandf. 256.

[2] Parmiter *v.* Coupland, 6 M. & W. 105; Snyder *v.* Andrews, 6 Barb. 43. But in Pennsylvania the rule is otherwise; there the Court is bound to instruct the jury whether the publication is or is not libellous. (Pittock *v.* O'Neill, 63 Penns. 253.)

[3] Baylis *v.* Lawrence, 3 Perr. & D. 526.

[4] Darby *v.* Ouseley, 1 Hurl. & N. 1; Snyder *v.* Andrews, 6 Barb. 55; and see Empson *v.* Fairford, W. W. & D. 10; 1 Jurist, 20.

[5] Hakewell *v.* Ingram, 2 Com. Law Rep. 1397; and see Levi *v.* Milne, 4 Bing. 195; Long *v.* Eakle, 4 Md. 454; Usher *v.* Severance, 20 Maine, 9; Goodrich *v.* Davis, 11 Metc. 474.

[6] Van Aikin *v.* Caler, 48 Barb. 58.

§ 287. Where the circumstances of the publication are controverted or uncertain, a case is presented in which the court is to instruct the jury what condition of circumstances would render the publication privileged, and then leave it to the jury to determine the character of the publication, and give a verdict accordingly. For the jury cannot decide whether a libel was published on a justifiable occasion, without being told by the court what facts would constitute such an occasion.[1] The uncertainty as to the facts may consist either in the happening or not happening of certain events, or in the question whether or not the language exceeded the privileged limits.

§ 288. The facts being uncontroverted, the court is to determine whether or not the publication is privileged.[2] If the court decides that the publication is *absolutely* privileged, that of course determines the action; if the court decides the publication is *conditionally* privileged, then it is a matter of law for the court to determine whether there is any *intrinsic* or *extrinsic* evidence of malice. If the court decides this question in the negative it directs a nonsuit or a verdict for the defendant, without reference to the jury.[3] But if the court decides there is any evidence, either in the language of the publication itself (intrinsic evidence), or in the circumstances of its publication, from which a want of good faith or a bad intent (malice) on the part of the publisher may be inferred, it then becomes the duty of the court to submit to the jury, with appropriate instructions, and as a question of fact for their determination, whether in making the publication the publisher acted in good faith or otherwise;[4] for the

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[1] Duncan *v.* Brown, 15 B. Monr. 186.

[2] Darby *v.* Ouseley, 1 Hurl. & N. 1; Wenman *v.* Ash, 13 C. B. 836.

[3] Cooke *v.* Wildes, 5 El. & Bl. 328; Somerville *v.* Hawkins, 10 C. B. 583; Taylor *v.* Hawkins, 16 Q. B. 308; Harris *v.* Thompson, 13 C. B. 333; Wenman *v.* Ash, *id.* 836; Fry *v.* Bennett, 5 Sandf. 54; Jarvis *v.* Hathaway, 3 Johns. 180.

[4] Lancey *v.* Bryant, 30 Maine (17 Shep.), 466; Powers *v.* Smith, 5 B. & A. 850; Abrams *v.* Smith, 8 Blackf. 95.

question of malice in such a case is always a question of fact to be determined by the jury.[1] Thus where defendant had charged plaintiff with stealing and had her searched for a brooch, missing but afterwards found in defendant's possession, held to be a question for the jury whether the charge was made *bona fide*, and that the circumstances and occasion of making it should be left to their consideration;[2] and to entitle a plaintiff "to have the question of malice submitted to the jury, it is not necessary that the evidence should be such as *necessarily* leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice, but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence;[3] and where the only evidence of malice was claimed to be on the face of the publication, held that it ought to have been left to the jury to determine whether there was any malice.[4] But where the libel purported to be the report of a proceeding in the insolvent court, and imputed to the insolvent's landlord (the plaintiff) that he colluded with the insolvent in putting in a fictitious distress; held that the judge ought not to have left it as a question to the jury whether the defendant *intended* to injure the plaintiff, but that if he

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[1] White *v.* Nicholls, 3 How. U. S. Rep. 266; Blackburn *v.* Blackburn, 4 Bing. 395; Robinson *v.* May, 2 J. P. Smith, 3; Bodwell *v.* Osgood, 3 Pick. 379; Toogood *v.* Spyring, 1 Cr. M. & R. 181; Bromage *v.* Prosser, 6 D. & R. 296; Haight *v.* Cornell, 15 Conn. 74; Gardner *v.* Slade, 13 Ad. & Ell. N. S. 796; Pattison *v.* Jones, 8 B. & C. 578. See § 399, *post.*

[2] Padmore *v.* Lawrence, 3 Perr. & D. 209. Court to leave *bona fides* to jury, and then to determine whether or not the publication is privileged. (Stace *v.* Griffith, Law Rep. II, Pri. C. C. 420; Little *v.* Clements, 1 Ir. C. L. 194.) Whether or not the occasion gives the privilege is a question of law. Whether or not the defendant has fairly conducted himself in the execution of the privilege, is a question of fact for the jury. (Dickson *v.* Earl Wilton, 1 Fost. & F. 419; and see George *v.* Goddard, 2 Fost. & F. 689.)

[3] Somerville *v.* Hawkins, 10 C. B. 583; and see Taylor *v.* Hawkins, 16 Q. B. 308; Harris *v.* Thompson, 13 C. B. 333; Wenman *v.* Ash, 13 C. B. 836.

[4] Gilpin *v.* Fowler, 9 Ex. 615; 18 Jur. 292.

thought the tendency of the publication injurious to the plaintiff, he ought to have told them it was actionable, and the plaintiff entitled to a verdict.[1]

§ 289. The amount of damages is to be determined by the jury, but the court should instruct them as to the rules by which they should be governed in fixing the amount.[2] A general instruction to find such damages as under all the circumstances they thought right, was held to be improper.[3] It was held no ground for exception that the judge *advised* the jury to give only nominal damages.[4] A charge that compensatory damages are to be given where the publication is without malice, and that compensatory damages are such as will repay the costs and trouble of the suit and of disproving the defendant's allegations, was held right,[5] although it has been held erroneous to charge the jury to take into con-

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[1] Haire *v.* Wilson, 9 B. & Cr. 643.

[2] True *v.* Plumley, 36 Maine, 466. Held that in directing the jury, as to damages, it was not necessary for the judge to caution the jury, as to the amount of injury sustained, by telling them to take into consideration the fact that one publication only had been proved, and that a mere sale to the plaintiff's agent, of a copy of the paper containing the libel. (Brunswick *v.* Harmer, 14 Q. B. 189.) If there was only one witness to the speaking of words charging theft, and he testifies that his opinion of the person slandered was not thereby affected, and that he still believed him to be honest, yet, if the words were spoken maliciously, it is erroneous to limit the jury to nominal damages. (Markham *v.* Russell, 12 Allen (Mass.), 573.)

[3] Duncan *v.* Brown, 15 B. Monr. 186.

[4] Matthews *v.* Beach, 5 Sandf. 256. Where the judge recommended the jury to give nominal damages, but the jury gave £5 damages, the court refused to set the verdict aside. (Chilvers *v.* Greaves, 5 M. & G. 578.) The right of the court to direct a verdict for nominal damages doubted. (Strong *v.* Kean, 13 Irish Law Rep. 93.) Where the publication complained against was the publication, in the defendant's newspaper, of a printed report of a committee of investigation distributed to the shareholders in a company, the judge charged the jury that although the publication by the defendant was unauthorized, yet, as the publication to the shareholders was authorized, they might give nominal damages. (Davis *v.* Cutbush, 1 Fost. & F. 487.) In an action against a newspaper for publishing a libellous item of news, the proprietors not having acted with express malice, and not having shown negligence in their choice of reporters, *held*, that exemplary damages should not have been allowed. (Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447.)

[5] Armstrong *v.* Pierson, 8 Clarke (Iowa), 29.

sideration the expense to which the plaintiff has been put by being compelled to come into court to vindicate his character.[1] It has been usual, in the English courts, to tell the jury that they are not to consider the effect of verdict upon the costs.[2] In New York it seems always to have been the rule to inform the jury of the effect of the the verdict upon the costs.[3] And at least some of the judges in the courts of England are disposed to follow the rule prevailing in the New York courts, where, on a motion for a new trial, on the ground that the jury had given a verdict for a small amount of damages, under the erroneous impression that it was an amount sufficient to carry costs, the rule was refused; but by Pollock, Ch. B. "There is no reason why the jury should not be informed, if they ask it, (what amount of verdict will carry costs), as it is a part of the law, but if they do not ask it, and they have given their verdict, it cannot be disturbed merely because they did not know it."[4] In a case tried

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[1] Hicks *v.* Foster, 13 Barb. 663. In Wakelin *v.* Morris, 2 Fost. & F. 27; the defendant's counsel proposed to put a question to plaintiff's attorney, as to what would be the probable cost to the defendant if the verdict was for nominal damages only, and the question was admitted.

[2] The effect of the verdict upon the costs is to be laid entirely out of consideration, and with which the jury have nothing to do. (Mears *v.* Griffin, 2 Sc. N. S. 15.) And so recently as 1868, sittings, after Mich. Term. in an action of libel, (Bradlaugh *v.* Brooks), the jury after retiring to consider their verdict, returned into court and inquired of the judge (Blackburn J.), what amount of damages would carry costs, he declined to inform them, saying that, according to law, the costs follow the verdict and a verdict ought not be given which depended upon the law as to costs. And in Wilson *v.* Reed, 2 Fost. & F. 149, the court refused; to inform the jury what amount of damages would carry costs. In California the same rule seems to prevail. See Shay *v.* Toulumne Water Co., 6 Cal. 286.

[3] Elliott *v.* Brown, 2 Wend. 500; Nolton *v.* Moses, 3 Barb. 31; Waffle *v.* Dillenback, 38 N. Y. 53.

[4] Kilmore *v.* Abdoolah, 27 Law Jour. 307 Ex. But on the same occasion Bramwell, B. said, "The jury have no right to give a verdict with reference to any thing else than the injury sustained by the plaintiff." Where, on the execution of a writ of inquiry in an action for slander, the jury were incorrectly informed by the undersheriff as to the amount of damages which would carry costs, and they found a a verdict for less than forty shillings, it was held no ground for a new writ of inquiry, or for increasing the amount of damages. (Grater *v.* Collard, 6 Dowl. 503.)

before Erle, C. J., he charged the jury. "If you believe that the plaintiff really was required to bring this action to vindicate his character, then you may think it proper to give substantial damages which will carry costs. But if you think that it was not so, and that the words did no real injury, you can find nominal damages which will not carry costs," and upon the jury asking what sum would carry costs, the judge answered, "I am not aware that there is anything to preclude my telling you," and he told them.[1] In an action of slander for words imputing unchastity to the plaintiff, the jury were instructed that the rule with respect to damages was, to give such as were commensurate with the injury sustained by the acts charged and proved against the defendants; that if the plaintiff was an innocent and virtuous female, and her character had been destroyed by the slanders of the defendant and others, they might give liberal damages; but if the plaintiff had so destroyed her character, by her own lewd and dissolute conduct, as to have sustained no injury from the words spoken by the defendant, they might give only nominal damages. This was held correct.[2] Where the defendant suffers judgment to go by default, and the damages are assessed by a sheriff's jury, although the plaintiff gives no evidence of damage, the jury are not confined to nominal damages.[3] Where the language is actionable, *per se*, the mere fact that special damage is alleged will not prevent the plaintiff, on failing to establish his special damages, from recovering general damages.[4]

§ 290. In general, prospective damages are not to be allowed, and damages arising after suit brought are not to

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[1] Wakelin *v.* Norris, 2 Fost. & F. 26; and see in a note to that case.

[2] Flint *v.* Clarke, 13 Conn. 361. See, Mitigation.

[3] Cottrell *v.* Jones, 11 C. B. 713; 3 B. & C. 427.

[4] Smith *v.* Thomas, 2 Bing. N. C. 380; Brown *v.* Smith, 13 C. B. 569; Evans *v.* Harris, 1 Hurl. & N. 254.

be taken into account,[1] although it has been held that the jury are to consider the probable future as well as the actual past;[2] and in an action of libel upon copartners, held the jury might consider the prospective injury to the copartnership;[3] and in a case of libel on the plaintiff in connection with a steam vessel, he was allowed to show diminished earnings of the vessel subsequent to the bringing of the action.[4] Where, in consequence of the defamation the plaintiff lost an office dependent on the will of his superior, it was held the jury were to consider both the nature and tenure of the office, and not give the value of an annuity certain.[5] Where the damage proved was the loss of a situation of fifty pounds a year, and the jury gave a verdict for sixty pounds, the court refused to disturb it.[6] Mental suffering and sickness induced by the publication are not such natural consequences of defamation as to amount to special damage,[7] and in a joint action by partners, it was held that no damages could be given for any injury to the private feelings of the plaintiffs, but only for such injury as they had sustained in their joint trade.[8] The jury must give some damages,[9] and where actual ill-will is shown, they may give exemplary

[1] Goslin *v.* Corry, 7 Mann. & G. 343; Keenholts *v.* Becker, 3 Denio, 346; Phil. R. R. Co. *v.* Quigley, 21 How. U. S. Rep. 202; Mayne on Damages, 277.

[2] True *v.* Plumley, 36 Maine, 466; Harrison *v.* Pearce, 1 Fost. & F. 567.

[3] Gregory *v.* Williams, 1 Carr. & K. 658.

[4] Ingram *v.* Lawson, 6 Bing. N. C. 212.

[5] Lever *v.* Torrey, 1 Murray, 350.

[6] Jackson *v.* Hopperton, 16 C. B. N. S. 829.

[7] Terwilliger *v.* Wands, 17 N. Y. 54; Wilson *v.* Goit, 17 N. Y. 442; overruling Brandt *v.* Towsley, 13 Wend. 253; Fuller *v.* Fenner, 16 Barb. 333, and Swift *v.* Dickerman, 31 Conn. 285.

[8] Haythorn *v.* Lawson, 3 Car. & P. 196. In an action of libel against two persons, one of them suffered judgment by default, the other pleaded "not guilty" questioned if the damages could be jointly assessed. Note to Watts *v.* Fraser, 7 A. & E. 233.

[9] Jewett *v.* Whitney, 43 Maine, 242; although it may be shown that defendant was benefited by the defamation. It will not be permitted the defendant to attempt to show that the plaintiff was benefited by the alleged libel, such an attempt was made in Fry *v.* Bennett, 5 Sandf. 76; and see Baylis *v.* Lawrence, 11 Ad. & El. 924. See *post*, Mitigation.

or vindictive damages.[1] The damages cannot exceed the amount claimed, and a direction to that effect is proper;[2] and where the plaintiff had a verdict for more damages than he claimed in his declaration, the court refused him leave to amend the declaration so as to keep the verdict.[3]

§ 291. Where there are several counts, and a verdict is entered generally on all the counts, and entire damages are given, if one count is bad, the judgment will be arrested, and a *venire de novo* awarded.[4] But if the judge who tried the cause certifies that the evidence applied only to the good counts, or it is otherwise apparent that the defective count has not influenced the amount of the verdict, the verdict will be amended by confining it to the good counts. Where there is any doubt as to any one count, it is prudent to have the damages assessed severally, or to abandon the doubtful count, and take a verdict on the other counts only.[5] By a defective count

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[1] Taylor *v.* Church, 8 N. Y. 452; Hunt *v.* Bennett, 4 E. D. Smith, 647; 19 N. Y. 173; Fry *v.* Bennett, 4 Duer, 247; Kinney *v.* Hosea, 3 Harring. 397; Gilbreath *v.* Allen, 10 Ired. 67; Cramer *v.* Noonan, 4 Wis. 231; Hosley *v.* Brooks, 20 Ill. 115; Knight *v.* Foster, 39 N. Hamp. 576. The right to give vindictive damages has been questioned. See Austen *v.* Wilson, 4 Cush. 273; Taylor *v.* Carpenter, 2 Wood. & M. 1; 2 Greenl. Ev. tit. Damages; Sedgwick on Damages, Appendix, 1st edit. and 4th edit. p. 532. It was held in an action for assault that vindictive damages might be given, although the defendant had previously been indicted for the same assault, and fined $250. (Cook *v.* Ellis, 6 Hill, 467.)

[2] Pool *v.* Devers, 30 Ala. 672.

[3] Curtis *v.* Lawrence, 17 Johns. 111. The declaration may, it seems, be amended on the terms of submitting to a new trial (Bowman *v.* Early, 3 Duer, 691), if the defendant insists on a new trial. (Corning *v.* Corning, 6 N. Y. 98.)

[4] Cox *v.* Lee, Law Rep. IV, Ex. 287, 38 Law Jour. 219, Ex.

[5] See 2 Stark. Sland. 107; Heard on Libel, §§ 303, 304; Fry *v.* Bennett, 28 N. Y. 326; Holt *v.* Scholefield, 6 T. R. 694; Lloyd *v.* Morris, Willes R. 443; Bennett *v.* Wells, 12 Mod. 420; Grant *v.* Astle, 2 Doug. 730; Empson *v.* Griffin, 11 Adol. & El. 187; Leach *v.* Thomas, 2 M. & W. 427; Gould *v.* Oliver, 2 Scott, N. R. 630; 2 M. & G. 208; Ayrey *v.* Fearnsides, 4 M. & W. 168; Lewin *v.* Edwards, 9 M. & W. 720; Day *v.* Robinson, 1 Ad. & El. 558; 2 N. & M. 884; Angle *v.* Alexander, 7 Bing. 119; Eddowes *v.* Hopkins, 1 Doug. 377; Reg. *v.* Verrier. 12 Adol. & El. 331, overruling Williams *v.* Breedon, 1 Bos. & Pul. 329; Burnett *v.* Wells, 12 Mod. 420; see also Union Turnpike Co. *v.* Jenkins, 1 Caines, 392; Hopkins *v.* Beadle, *id.* 347; Lyle *v.* Clason, *id.* 583; Livingston *v.* Rogers, *id.* 587; Stafford *v.* Green, 1 Johns. 565;

is meant a count which shows no cause of action; a count which contains actionable words, together with words not actionable, would not be defective so as to affect a verdict on such count. In such a case, it is intended that the verdict applied only to the actionable words.[1]

§ 292. Where there is a misjoinder of several counts, and general damages are assessed, judgment will be arrested. In cases of misjoinder of counts, the verdict may be taken for the plaintiff on the counts properly joined, and for the defendant on the other count or counts, or the plaintiff may enter a *nolle prosequi* as to the count or counts improperly joined.[2] Where there were two counts upon the same words, but published at different times, a general verdict for the plaintiff was upheld.[3] A general verdict on five counts held not responsive to either count.[4] A verdict that "the defendant spoke and published the

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Cooper *v.* Bissell, 15 Johns. 318; Sayre *v.* Jewett, 12 Wend. 135; Addington *v.* Allen, 11 Wend. 374; Case *v.* Buckley, 15 Wend. 327; Yrisarri *v.* Clements, 3 Bing. 432; Neal *v.* Lewis, 2 Bay, 204; Hogg *v.* Wilson, 1 Nott & McC. 216; Kennedy *v.* Lowry, 1 Binney, 397; Shafer *v.* Kintzer, *id.* 537; Paul *v.* Harden, 9 S. & R. 23; Smith *v.* Cleveland, 6 Metc. 332; Baker *v.* Sanderson, 3 Pick. 348; Cornwall *v.* Gould, 4 Pick. 444; Patten *v.* Greeley, 17 Mass. 182; Barnard *v.* Whiting, 7 Mass. 358; Barnes *v.* Hurd, 11 Mass. 57; Sullivan *v.* Holker, 15 Mass. 374; Clark *v.* Lamb, 6 Pick. 512; Kingsley *v.* Bill, 9 Mass. 198; Dryden *v.* Dryden, 9 Pick. 546; Hayter *v.* Moat, 2 M. & W. 56; Gregory *v.* Duke of Brunswick, 7 Sc. N. R. 972; Harker *v.* Orr, 10 Watts, 245; Ruth *v.* Kutz, 1 Watts, 489; Gosling *v.* Morgan, 32 Penns. 273; Stitzell *v.* Reynolds, 59 Penns. 488; Pemberton *v.* Colls, 16 Law Jour. Rep. 403, Q. B.; 11 Jurist, 1011; Cook *v.* Cox, 3 M. & S. 110; Clement *v.* Fisher, 7 B. & Cr. 459; 1 M. & R. 281. A verdict supported by one count held good. Marshall *v.* Gunter, 6 Rich. 419; Graves *v.* Waller, 19 Conn. 90; Bloom *v.* Bloom, 5 S. & R. 391; Hoag *v.* Hatch, 8 Monthly Law Rep. N. S. 686.

[1] Mayne on Damages, 237; Bridges *v.* Horner, Carthew, 230; Nicholls *v.* Reeve, 1 Freeman, 83; Cheetham *v.* Tillotson, 5 Johns. 430; Griffith *v.* Lewis, 8 Q. B. 844, 7 Adol. & El. N. S. 67; Alfred *v.* Farlow, 8 Q. B. 853; Lloyd *v.* Morris, Willes, 443; Hughes *v.* Rees, 4 M. & W. 204; Campbell *v.* Lewis, 3 Barn. & Ald. 392; Edwards *v.* Reynolds, Hill & Denio, Sup. 53; Sherry *v.* Freeking, 4 Duer, 452.

[2] Corner *v.* Shew, 3 M. & W. 350; Kitchenman *v.* Skeel, 3 Ex. 49; Knightley *v.* Birch, 2 M. & S. 533.

[3] Bradley *v.* Kennedy, 2 Greene, 231.

[4] Cock *v.* Weatherby, 5 S. & M. 333.

words in the complaint specified," was upheld.[1] And so of a verdict that found "the defendant guilty of wilful and malicious slander."[2] In an action for libel there were eight special pleas of justification, and issue thereon; the jury found for the plaintiff on three issues, and for the defendant on the residue of the pleas; the verdict was held void because it did not assess the plaintiff's damages on the issues found for him.[3] A plea of justification in an action for a libel contained three material allegations, as to one of which the jury expressed themselves of opinion that the proof failed. The judge told them that, to warrant a finding in favor of the defendant, they must be satisfied that all three of the allegations were substantially made out. The jury, after two hours' deliberation, returned a verdict for the defendant upon that plea. The court refused to set it aside.[4]

§ 293. As the amount of damages in an action for slander or libel is always a subject for the exercise of the sound discretion of the jury, who may give more or less according to their conclusions from the whole case respecting the motives of the publisher,[5] a verdict in such an action will not be set aside for excessive damages unless there is some suspicion of unfair dealing,[6] or "unless the case be such as to furnish evidence of prejudice, partiality or corruption on the part of the jury."[7] The case must be

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[1] Carlock *v.* Spencer, 2 Eng. 12.

[2] Benaway *v.* Congre, 3 Chand. 214; and see Harding *v.* Brooks, 5 Pick. 244; Scott *v.* Cook, 1 Duvall, 314.

[3] Clement *v.* Lewis, 3 B. & B. 297; 3 B. & A. 702.

[4] Napier *v.* Daniell, 3 Sc. 417; 2 Hodges, 187; 3 Bing. N. C. 77. Where a plaintiff is entitled as against the defendant to be relieved from a verdict obtained against him, the court will not abstain from interfering on the ground of the lien of the plaintiff's attorney for his costs. (Symons *v.* Blake, 2 C. M. & R. 416.)

[5] Davis *v.* Davis, 2 N. & M. 81; Trabue *v.* Mayo, 3 Dana, 138.

[6] Mayson *v.* Sheppard, 12 Rich. Law, (S. Car.) 254.

[7] Lawyer *v.* Smith, 1 Denio, 207; Hartin *v.* Hopkins, 9 Johns. 36; Jarvis *v.* Hathaway, 3 Johns. 180; Rundell *v.* Butler, 10 Wend. 119; Bailey *v.* Dean, 5 Barb.

very gross, and the damages enormous, to justify ordering a new trial on a question of damages.[1] A new trial was granted on payment of costs, and under peculiar circumstances, where the verdict was £150,[2] and so where the damages were $5,000.[3] There is nothing to forbid the granting a new trial, in a proper case, for insufficient damages, but the granting a new trial for insufficient damages is of rare occurrence. Where the plaintiff was a minister of the gospel, and the damages only one farthing, the court refused a new trial.[4] The court may order a

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297; Spencer *v.* McMasters, 16 Ill. 405. Where the receivers in an administration suit in conducting a gazette belonging to the testator published a libel, and the chief clerk, acting under the direction of the vice-chancellor, certified the amount of damages payable for the injury, an application to the vice-chancellor to increase the amount of damages on account of their inadequacy was dismissed, but as the libel was published through the carelessness of the receivers, they were saddled with the costs of the application. (Stubbs *v.* Marsh, 15 Law Times, N. S. 312; see Martin *v.* Van Schaick, 4 Paige, 479.)

[1] Tillotson *v.* Cheetham, 2 Johns. 63; Coleman *v.* Southwick, 9 Johns. 45; Southwick *v.* Stevens, 10 Johns. 443; Root *v.* King, 7 Cow. 613; Moody *v.* Baker, 5 Cow. 351; Cole *v.* Perry, 8 Cow. 214; Ostrom *v.* Calkins, 5 Wend. 263; Douglas *v.* Tousey, 2 Wend. 352; Cook *v.* Hill, 3 Sand. 341; Riley *v.* Nugent, 1 A. K. Marsh. 431; Ryckman *v.* Parkins, 9 Wend. 470. The court refused to grant a new trial for excessive damages where the amount was severally $1,000 (Bell *v.* Howard, 4 Litt. 117); $300, charge horse stealing (Faulkner *v.* Wilcox, 2 Litt. 369); $2,736, charge perjury (Sanders *v.* Johnson, 6 Blackf. 51); $500, charge horse stealing (Teagle *v.* Deboy, 8 Blackf. 134); £750, charge against a minister of the gospel (Highmore *v.* Harrington, 3 C. B. N. S. 142); £350 (Wakley *v.* Cooke, 4 Ex. 511); $334 (Ross *v.* Ross, 5 B. Monroe, 20); $212 (St. Martin *v.* Desnoyer, 1 Min. 156); $4,000 (Litton *v.* Young, 2 Metc. (Ky.), 558); $15,000 (Trumbull *v.* Gibbons, N. Y. Judicial Repository, 1); $10,000 (Fry *v.* Bennett, 4 Duer, 247); £1,000 (Gfroerer *v.* Hoffman, 16 Up. Can. Q. B. R. 441); $707 (Shute *v.* Barrett, 7 Pick. 82); $591 (Oakes *v.* Barrett, 7 Pick. 82); $3,500 (McDougall *v.* Sharp, 1 City Hall Recorder, 154); $1,400 (Bodwell *v.* Osgood, 3 Pick. 379; and see Baker *v.* Briggs, 8 Pick. 122; Sargent *v.* ——, 5 Cow. 106; Mayne on Dam. 347; Chambers *v.* Caulfield, 6 East, 256; Hewlett *v.* Crutchley, 5 Taunt. 277; Coffin *v.* Coffin, 4 Mass. 1; Neal *v.* Lewis, 2 Bay, 204; Edgar *v.* Newell, 24 Up. Can. Q. B. Rep. 215; Myers *v.* Curry, *id.* 470; Treanor *v.* Donahue, 9 Cush. 228; Wood *v.* Gunston, Style, 465; referred to Clapp *v.* Hudson River R. R. Co. 19 Barb. 465; Bruton *v.* Downes, 1 Fost. & F. 668.

[2] Swan *v.* Clelland, 13 Up. Can. Q. B. Rep. 335; and the plaintiff having died since the verdict was rendered, defendant was put under terms not to assign death of plaintiff as error, if on new trial the verdict was for the plaintiff.

[3] Netle *v.* Harrison, 2 McCord, 230. New trial where damages $2,500 (Freeman *v.* Tinsley, 59 Ill. 497).

[4] Kelly *v.* Sherlock, Law Rep. I, 686, Q. B. and see Mears *v.* Griffin, 2 Sc. N. S.

new trial unless the plaintiff consents to reduce the damages. Thus where the damiages were $600, the court ordered a new trial, unless the plaintiff would consent to reduce them to $200.[1]

§ 294. A new trial will not be granted because a verdict for defendant should have been for plaintiff with nominal damages.[2] A new trial will be granted to admit newly discovered evidence to support a defense of not guilty, but not to support a justification.[3] A new trial was refused where since the verdict for the plaintiff he had been convicted, partly on the evidence of the defendant, of the offense charged.[4] A new trial was refused where a witness for the plaintiff had since the trial been convicted of perjury.[5] Where plaintiff obtained a verdict for one shilling damages, in consequence, as he supposed,

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15; Irwin *v.* Cook, 24 Texas, 244. "There appears to be no case in an action of slander or libel in which a new trial has been granted on such a ground"—by counsel in Forsdike *v.* Stone, Law Rep. III, 607, C. P. In that case the charge was that the female plaintiff had been guilty of adultery, and the damages were one shilling, a new trial was refused, and it was said that no new trial would be granted for insufficient damages unless there had been a mistake in point of law on the part of the presiding judge, or a mistake in the calculation of figures, or misconduct by the jury. In Ohio (Code § 298), it is provided: A new trial shall not be granted on account of smallness of damages in an action for injury to the person or reputation. New trial because damages too small refused (Rendall *v.* Hayward, 5 Bing. N. C. 424; L'd Gower *v.* Heath, Barnes' Notes, 445; Hayward *v.* Newton, 2 Str. 940). New trial granted because damages too small, *and because* error in charge (Kenney *v.* McLaughlin, 71 Mass. 3).

[1] Potter *v.* Thompson, 22 Barb. 87. Such a proceeding held improper. (Cassin *v.* Delany, 6 Trans. App. 202; 6 Abb. Pr. R. N. S. 1; Moffat *v.* Sackett, 11 N. Y. 522.) The court refused a new trial, but reduced the amount of damages. (Gostling *v.* Brooks, 2 Fost. & F. 76.) In the case of Attorney-general of Jersey *v.* Ennis, an action of slander mentioned in a note to Warren's Law Studies, the plaintiff appealed to the privy council from a verdict for the defendant given by the Royal Court at Jersey, the privy council not only set aside the verdict, but ordered the verdict to be entered for the plaintiff, with £50 damages.

[2] Patton *v.* Hamilton, 12 Ind. 256; Rundell *v.* Butler, 10 Wend. 119. See, however, Levi *v.* Milne, 4 Bing. 195.

[3] Beers *v.* Root, 9 Johns. 264.

[4] Symons *v.* Blake, 2 C. M. & R. 416; 4 Dowl. Pra. Cas. 263; 1 Gale, 182.

[5] Eakins *v.* Evans, 3 Up. Can. Q. B. Rep. 383, O. S.

of the admission of improper evidence, it was held that having recovered a verdict, he could not insist on his objections to evidence, and a new trial was refused.[1]

§ 295. Actions for slander and libel are in the nature of a penal action, and though the jury find for the defendant against the weight of evidence, a new trial is never [seldom] granted.[2] To warrant a new trial on the ground that the verdict is against evidence, it must be a very clear case.[3] A new trial was granted because the language published did not warrant the innuendoes;[4] and so where the innuendo was disproved.[5]

§ 296. In New York, if the plaintiff recover less than $50 damages, he can recover no more costs or disbursements than damages.[6] The defendant may, at any time before verdict, offer to allow judgment to be taken against him for a certain sum with costs; the non-acceptance by plaintiff of such an offer will subject him to costs subsequent to its service, unless he recover a more favorable judgment.[7] In England, if the damages in an action for slanderous words are less than forty shillings, the plaintiff, by statute 21 James I, recovers no more costs than damages; the statute was held not to apply to actions

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[1] Rogers *v.* Munns, 25 Up. Can. Q. B. Rep. 153; and see Smith *v.* Kerr, 1 Barb. 155; Case *v.* Marks, 20 Conn. 248. Where plaintiff had a verdict for five shillings, a new trial was granted, the court recommending a *stet processus*. (Shaver *v.* Linton, 22 Up. Can. Q. B. 177.)

[2] *Ex-parte* Bailey, 2 Cow. 479; Hartin *v.* Hopkins, 9 Johns. 36; and see Hurtert *v.* Weines, 27 Iowa, 134.

[3] Root *v.* King, 7 Cow. 613, affirmed 4 Wend. 113; Paddock *v.* Salisbury, 2 Cow. 811; Kelly *v.* Partington, 4 B. & Ad. 700; Fisher *v.* Clement, 10 B. & Cr. 472; Blackburn *v.* Blackburn, 4 Bing. 395; 1 M. & P. 33; Broom *v.* Gosden, 1 C. B. 728; Hunt *v.* Bennett, 4 E. D. Smith, 657.

[4] Yrisarri *v.* Clement, 3 Bing. 432.

[5] Johnston *v.* McDonald, 2 Up. Can. Q. B. Rep. 209. There cannot be a new trial upon one of several issues. (Morrison *v.* Harmer, 4 Sc. 530.)

[6] Code of Pro. § 304.

[7] Code of Pro. § 385.

where the special damages are the gist of the action, nor to slander of title nor to libel.[1]

§ 296*a*. Where a plaintiff in an action for slander or libel has had an opportunity of trying the action upon its merits, and has consented to a nonsuit, and afterwards brings a second action for substantially the same cause, leaving the costs of the former action unpaid, the court may stay the proceedings in the second action until the costs of the first action are paid,[2] and this, although the second action is in a different court to that in which the first action was brought.[3]

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[1] As to costs in the courts of England, Skelton *v.* Seward, 1 Dowl. 411; Skinner *v.* Shoppee, 6 Bing. N. C. 131; Simpson *v.* Hardie, 2 M. & W. 84; 5 Dowl. 304; Foster *v.* Pointer, 8 M. & W. 395; 1 Dowl. 28; 9 C. & P. 718; Empson *v.* Fairfax, 3 Nev. & P. 385; Dodd *v.* Crease, 2 Cr. & M. 223; 4 Tyrw. 74; 2 Dowl. 269; Lafone *v.* Smith, 4 Hurl. & Nor. 158; Saville *v.* Jardine, 2 H. Black. 531; Halford *v.* Smith, 4 East, 567; Richards *v.* Cohen, 1 Dowl. 533; Goodall *v.* Ensall, 3 Dowl. 743; Grenfel *v.* Pierson, 1 Dowl. 400; Turner *v.* Horton, Willes, 438; Andrews *v.* Thompson, 8 Bing. 431; Forbes *v.* Gregory, 1 Cr. & M. 435; 1 Dowl. 679; Harrison *v.* Bush, 5 E. & B. 344; Biddulph *v.* Chamberlain, 17 Q. B. 351; Kelly *v.* Partington, 5 B. & Ad. 645; 2 Nev. & M. 460; Prynne *v.* Browne, 1 Dowl. N. S. 680; 2 Stark. Sland. 113; Stat. 58 Geo. III, ch. 30; and by statute 3 and 4 Vict. c. 24, § 2, on a certificate by the judge that the injury was wilful and malicious, the plaintiff may recover costs, although the verdict is for less than forty shillings; as to this see Forsdike *v.* Stone, Law Rep. III, 607, C. P.; and see 30 and 31 Vict. ch. 142; Ings *v.* London and So. West. R. R., Law Rep. IV, 17, C. P.; Gray *v.* West, Law Rep. IV, 175, Q. B.; Sampson *v.* Mackay, *id.* 643; Marshall *v.* Martin, Law Rep. V, 239, Q. B. As to costs in Vermont, see Nichols *v.* Packard, 16 Verm. 147. In Indiana, see Skinner *v.* Bronnenburg, 18 Ind. 363. In Arkansas, Hill *v.* Patterson, Hemp. 178.

[2] Hoare *v.* Dickson, 7 C. B. 164.

[3] Prowse *v.* Loxdale, 3 B. & S. 896.

CHAPTER XII.

PARTIES.

Question as to parties anticipated—Action by alien—Outlaw—Rebel—Executors or administrators—Married woman—Husband and wife—Partners—General rule as to joinder—Action against husband and wife—Contribution.

§ 297. The questions who may sue and who may be sued, of course generally depend upon the prior questions of rights and liabilities, and therefore, to some extent, the question of parties has been anticipated.[1] Subject to any exceptions which have been or may be mentioned, the rules as to parties which prevail in actions for torts generally apply to the actions for slander and libel.

§ 298. It was held that an alien friend, although residing in a foreign country, might maintain an action for a libel published in England.[2] Where the plaintiff in an action for libel was at the commencement of the action an outlaw, of which the defendant was ignorant until after notice of trial, the court after the trial stayed the proceedings, but removed the stay on the outlawry being reversed.[3] In an unreported case in New York (Cummings *v.* Bennett), it being shown that the plaintiff in an action for libel was an unpardoned rebel, the court

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[1] *Ante*, §§ 115, 119, notes. Where there were two actions for the same libel, one against the editor and the other against the publisher of the newspaper in which the publication was made, an application to consolidate was denied. (Cooper *v.* Weed, 2 How. Pra. R. 40; and see *post*, note 4, p. 500.)

[2] Pisani *v.* Lawson, 6 Bing. N. C. 90; 8 Dowl. 57; 8 Sc. 182.

[3] Somers *v.* Holt, 3 Dowl. Pr. Cas. 506; see Reg. *v.* Lowe, 8 Ex. 697.

at special term made an order dismissing the complaint, but the general term reversed the order. In an action for words imputing murder, the court allowed the defendant until the next term to plead, upon the ground that the plaintiff was to be tried for the alleged murder on an indictment then pending.[1]

§ 299. By the common law, actions of tort die with the person, and this rule applies to actions for slander[2] and libel, except in those States where a different rule is prescribed by statute. In New York, actions of tort, except slander and libel, survive.[3] But the death of a plaintiff after a judgment in his favor, and pending an appeal from the judgment, does not abate the appeal, and the personal representatives of the deceased may be substituted as respondents.[4] By statute in Maine, actions for slander and libel survive, and may be maintained in the name of the executor or administrator.[5] A right of action for slander or libel is not assignable, and does not pass under a general assignment to a receiver by a judgment creditor or to an assignee in bankruptcy.[6]

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[1] Gibson *v.* Niven, Barnes' Notes, 224.

[2] 1 Wm. Saund. 316 *a*, 6th ed.; Nettleton *v.* Dinehart, 5 Cush. 543; Walters *v.* Nettleton, 5 Cush. 544; Walford on Parties, 1392, 1449. At common law, where there is judgment against the defendant, and he appeals, and after the appeal the defendant dies, the judgment dies with him. (Faith *v.* Carpenter, 33 Geo. 79.)

[3] 2 Rev. Stat. of N. Y. 447, §§ 1, 2. By statutes in Ohio and Maryland, the right of action for slander or libel does not survive. In Ireland *v.* Champneys, 4 Taunt. 884, an action for libel, after interlocutory judgment and writ of inquiry executed, the plaintiff died, held that final judgment could not be entered, the suit having abated by the plaintiff's death. See Kramer *v.* Waymark, Law Rep. 1, Ex. 243.

[4] This was done in Sanford *v.* Bennett, 24 N. Y. 20; and as to death of plaintiff, see Miller *v.* Gunn, 7 How. Pr. R. 380.

[5] Nutting *v.* Goodridge, 46 Maine, 82. In Iowa, by statute, an action of libel is not abated by the death of the defendant. (Carson *v.* McFadden, 10 Iowa (2 With.), 91.) Death of a defendant after an appeal, held to abate the appeal. (Long *v.* Hitchcock, 3 Ham. 274.)

[6] Hudson *v.* Plets, 11 Paige, 180; and see Dowling *v.* Brown, 4 Irish Law Rep. N. S. 265; Benson *v.* Flowers, Sir W. Jones, 215; Howard *v.* Crowther, 8 M. & W. 601; Drake *v.* Beekham, 11 M. & W. 315, overruling s. c. 8 M. & W. 846.

§ 300. By statute in New York, a married woman may sue alone and without her husband, for slander or libel;[1] and so, under certain conditions, in Pennsylvania,[2] and in Scotland.[3] It has been held that the New York Statute does not authorize a suit for slander by a wife against her husband.[4] And it was held in Pennsylvania, that a married woman could not maintain an action for slander published at the instance of her husband.[5]

§ 301. Independently of any statutory provision for language actionable *per se*, published concerning a married woman, or concerning a woman who afterwards marries, the action should be brought in the name of the husband and wife.[6] In such a case the damage is to both plaintiffs, and the right of action in case of the death of the husband survives to the wife; but if the wife dies before verdict, the action abates.[7] For language concerning a married woman, but actionable only because of special damage to the husband, the husband must sue alone.[8] These rules are not affected by the fact that the

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[1] Laws of N. Y. 1860, ch. 90; *Id.* 1862, ch. 172.

[2] Rangler *v.* Hummell, 37 Penn. St. R. 130.

[3] Ewing *v.* Cullen, Boyd Kinnear's Dig. H. L. Cas. 188.

[4] Freethy *v.* Freethy, 42 Barb. 641; as to the right of a wife to protection against slander by her husband, see Deut. xxii. 13, 22.

[5] Tibbs *v.* Brown, 2 Grant's Cas. (Penn.) 39.

[6] 1 Stark. Slan. 349; Ebersol *v.* Krug, 3 Binney, 555; Newton *v.* Rowe, 8 Sc. N. R. 26; Dengate *v.* Gardiner, 4 M. & W. 5; Grove *v.* Hart, Sayre, 33; Baldwin *v.* Flower, 3 Mod. 120; Long *v.* Long, 4 Barr, 29.

[7] Stroop *v.* Swartz, 12 S. & R. 76; and see Smith *v.* Hixon, Str. 977, and 3 T. R. 627. Case for words by husband and wife against defendants, husband and wife; pending the action the male defendant died, and his widow remarried. The court inclined that the writ abated, but took time to advise. (White *v.* Harwood, Style, 138; Viner's Abr. Baron and Feme, *A. a.*)

[8] Williams *v.* Holdridge, 22 Barb. 396; Gazynski *v.* Colburn, 11 Cush. 10; Grove *v.* Hart, Bull. N. P. 7; Saville *v.* Sweeney, 1 Nev. & M. 254; 4 B. & Adol. 514; Horton *v.* Byles, 1 Sid. 387; Long *v.* Long, 4 Barr, 29; 1 Stark. Slan. 350; Bash *v.* Sommer, 20 Penn. St. R. 159; Coleman *v.* Harcourt, 1 Lev. 140; Klein *v.* Hentz, 2 Duer, 633.

husband and wife live apart under a deed of separation.[1] Where an action was brought by a wife living apart from her husband under articles of separation, in the names of her husband and herself, for defamatory words spoken of her, it was held that a release of the cause of action executed by the husband was a bar to the suit, although in the articles of separation the husband had covenanted that suits might be brought in the joint names of himself and his wife, for any injury to the person or character of the wife.[2] For a charge of a joint larceny by husband and wife, *semble* the husband should sue alone, because the wife is *prima facie* not liable criminally for a larceny committed in the presence of her husband.[3]

§ 302. Where the language published concerns both husband and wife, the husband may sue alone for the injury to him, and the husband and wife may sue jointly for the injury to the wife.[4] In an action by husband and wife, a plea that the plaintiffs were not man and wife at the time of the commencement of the action is a good plea in bar.[5] But it is not a defense to an action by husband and wife that the plaintiffs were not married at the time of the publication complained of.[6] Where the

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[1] Beach *v.* Ranney, 2 Hill, 309.

[2] Beach *v.* Beach, 2 Hill, 260.

[3] Bash *v.* Sommer, 20 Penn. St. R. 159. And where the defendant charged plaintiff's wife with keeping a bawdy house, it was held the husband might sue alone, as the words charged an indictable offense, for which, if true, the husband was liable to be punished. (Coward *v.* Wellington, 7 C. & P. 531.)

[4] Gazynski *v.* Colburn, 11 Cush. 10; Bash *v.* Sommer, 20 Penn. St. R. 159; Emington *v.* Gardiner, 1 Selw. N. P. 301; Smith *v.* Hobson, Style, 112: Ebersoll *v.* Krug, 3 Binney, 555; Hart *v.* Crow, 7 Blackf. 351, *ante*, note 1 p. 153. The court will not order such actions to be consolidated. Anon. Selwyn N. P. 301; Swithin *v.* Vincent, 2 Wils. 227; Subley *v.* Mott, Bull. N. P. 5. Now by statute 15 and 16 Vict. ch. 40, in an action by husband and wife for injury to the wife, in respect of which she is necessarily joined as a co-plaintiff, the husband may add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated. In case of the death of either plaintiff, such suit, so far as relates to the causes of action, if any, which do not survive, shall abate.

[5] Chantler *v.* Lindsey, 16 M. & W. 82; 4 Dowl. & L. 339.

[6] Spencer *v.* McMaster, 16 Ill. 405; and see Benaway *v.* Congre, 3 Chand. 214. But

husband and wife are improperly united as plaintiffs, and there is no demurrer, the error is cured by verdict,[1] or by omitting to demur.[2]

§ 303. For language published concerning partners in the way of their trade, all the partners may or should join;[3] but if the language concerns and injuriously affects either partner individually, he may sue alone.[4] The general rule is that where the injury is several, each person injured must sue separately and alone; as if one say, "A. and B. murdered C.," or "Either A. or B. murdered C.," A. and B. cannot maintain a joint action.[5]

§ 304. For a publication by a married woman of defamatory language, before or during coverture the action must be against her and her husband.[6] A husband and

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in an action by husband and wife, for words imputing adultery to the wife, it was held necessary to aver that they were husband and wife at the time of the publication. (Ryan *v.* Madden, 12 Verm. 51.)

[1] Russell *v.* Corne, 1 Salk. 119; 2 L'd Raym. 1031; Todd *v.* Bedford, 11 Mod. 264; Lewis *v.* Babcock, 18 Johns. 443.

[2] Code of Pro. N. Y. § 145. This defect cannot be insisted upon under a demurrer that the complaint does not state a cause of action. (Eidridge *v.* Bell, 12 How. Pra. R. 547.) No action can be maintained for the price of libellous pictures. (Fores *v.* Johnes, 4 Esp. 97.) A printer cannot recover for printing a libel. (Poplett *v.* Stockdale, R. & M. 337; Bull *v.* Chapman, 8 Ex. 104.) If a printer undertake to print a book, and as the work proceeds finds the matter is defamatory, he may decline to continue the work, and can recover for the part of the work which is not defamatory. (Clay *v.* Yates, 1 Hurl. & N. 73.) Nor could an action be maintained for breach of a contract to furnish manuscript of defamatory matter. (Gale *v.* Leckie, 2 Stark. R. 107.) Or for pirating a libellous book. (Stockdale *v.* Onwhyn, 5 B. & C. 173.) See Campbell's Lives of the Chancellors, X. 255, reviewing the decisions of Lord Eldon, who refused to protect the copy-right of alleged libellous works.

[3] Cook *v.* Batchellor, 3 B. & P. 150; 2 East, 426; Le Fanu *v.* Malcolmson, 1 Ho. of L'ds Cas. 637; 13 Law Times, 61; Foster *v.* Lawson, 3 Bing. 452; 11 Moore, 360; Browl. Rediv. 81; Haythorn *v.* Lawson, 3 Car. & P. 196; Pechell *v.* Watson, 8 M. & W. 691; 2 Wm. Saund. 117, 6th ed. see note to § 118, *ante*.

[4] Taylor *v.* Church, 1 E. D. Smith, 279; Harrison *v.* Bevington, 8 Car. & P. 708; Robinson *v.* Merchant, 7 Q. B. 918; Fidler *v.* Delavan, 20 Wend. 57; Longman *v.* Pole, 1 M. & M. 223; Tait *v.* Culbertson, 57 Barb. 9.

[5] Smith *v.* Cooker, Cro. Car. 513; 10 Mod. 198. As to one action against several for one libel, see Harris *v.* Huntington, 2 Tyler, 147; Watts *v.* Fraser, 7 C. & P. 369; Miller *v.* Butler, 6 Cush. 71; Glass *v.* Stewart, 10 S. & R. 222, *ante*, note 1 p. 497.

[6] Head *v.* Briscoe, 5 Car. & P. 484; and see *ante*, note 1 p. 153; Swithin *v.* Vin-

wife may be jointly sued for a joint publication of written defamatory matter.[5]

§ 305. In certain cases the plaintiff is entitled to elect *de melioribus damnis* (§ 119), or as to which of several parties he will sue, but neither in such cases nor in any other case can there be any contribution between the parties, it being a general rule of law that there is no contribution between wrong-doers.[1]

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cent, 2 Wils. 227; Burcher *v.* Orchard, Style, 349; 2 Wm. Saund. 117 *d.* 6th ed. Anderson *v.* Hill, 53 Barb. 238; Hawk *v.* Harman, 5 Binney, 43; Horton *v.* Payne, 27 How. Pr. R. 574.

[2] Catterall *v.* Kenyon, 3 Q. B. 310; Keyworth *v.* Hill, 3 B. & Ald. 685.

[4] See Merryweather *v.* Nixon, 8 T. R. 186 and notes thereto, 2 Smith's Lead. Cas. and in addition Moscati *v.* Lawson, 7 C. & P. 32; Andrews *v.* Murray, 33 Barb. 354, citing Miller *v.* Fenton, 11 Paige, 18; Coventry *v.* Barton, 17 Johns. 142; Peck *v.* Ellis, 2 Johns. Ch. 131; Pearson *v.* Skelton, 1 M. & W. 504: Hunt *v.* Lane, 9 Ind. 248; Minnes *v.* Johnson, 1 Duvall, (Ky.) 171; Silvers *v.* Nerdlinger, 30 Ind. 33. No contract will be *implied* to indemnify a party against the consequences of an illegal act, *e. g.* the publication of a libel. (Shackell *v.* Rosier, 3 Sc. 59; 2 Bing. N. C. 634.) And *semble* the proprietor of a newspaper convicted and fined for the publication of a libel in his paper, which libel was inserted without his knowledge or consent by the editor, has no right of action against the editor for the damages sustained through such conviction. (Colburn *v.* Patmore, 1 C. M. & R. 83; 4 Tyr. 677.) One cannot take security to be indemnified against the consequences of an illegal act. (Domat Civil Law, B'k iii. tit. 4, § 1, div. viii; and same book and title, § 5, div. 1; and see Howe *v.* Buffalo & Erie R. R. 38 Barb. 124; St. John *v.* St. John's Church, 15 Barb. 346.) A promise to indemnify one for publishing a libel, is void. (Arnold *v.* Clifford, 2 Summer, 238.) An indemnity against the consequences of an illegal act already done is binding. (Griffiths *v.* Hardenburgh, 41 N. Y. 469, citing Doty *v.* Wilson, 14 Johns. 379; Kneeland *v.* Rogers, 2 Hall, 579.)

CHAPTER XIII.

PLEADING.—THE COMPLAINT.

General requisities of a complaint—Complaint for language concerning a person only—Inducement—Colloquium—Publication—Matter published—Innuendo—Special damage—Several counts—Supplemental complaint.

§ 306, The complaint corresponds to the declaration in the common law system of pleading. Its general requisites are that it must state (1) the name of the court in which the action is pending; (2) the names of the parties; (3) the county in which it is desired the issues shall be tried; (4) the facts which constitute the cause of action; (5) a demand of relief. It must be subscribed by the plaintiff or his attorney, and may, at the option of the plaintiff, be verified. Of these several requisites we purpose to consider in detail only the fourth—the statement of the facts which constitute a cause of action.

§ 307. The statement of a cause of action must necessarily differ more or less according to the difference in the state of facts of each particular case. But there are certain allegations essential in every case to the sufficiency of such a statement; we will show what are these allegations, and endeavor to explain the rules by which their sufficiency may be tested. We premise by observing that we address ourselves exclusively to the statement of a cause of action for slander or libel *concerning the person.* Such a statement may be conveniently considered under the following heads: (1) The inducement; (2) The colloquium; (3) The act of publication; (4) The statement of the defamatory matter published; (5) The innuendoes; (6) The damages.

§ 308. We attempted in a previous chapter (Ch. vii) to explain (1) that the actionable quality of language was dependent upon its construction, and (2) how the construction may be affected by a variety of extrinsic circumstances. It is the office of the inducement to narrate the extrinsic circumstances which, coupled with the language published, affects its construction and renders it actionable; where standing alone and not thus explained, the language would appear either not to concern the plaintiff, or if concerning him not to affect him injuriously.[1] This being the office of the inducement, it follows that if the language published does not naturally and *per se* refer to the plaintiff nor convey the meaning the plaintiff contends for; or if it is ambiguous or equivocal, and requires explanation by some extrinsic matter to show its relation to the plaintiff, and make it actionable, the complaint must allege by way of inducement the existence of such extrinsic matter;[2] but that where the language published is

[1] "Inducement is the statement of the facts out of which the charge arises, or which are necessary or useful to make the charge intelligible." (Tindal, Ch. J., Tavemer *v.* Little, 5 Bing. N. C. 678.)

[2] Inducement is necessary where the language does not naturally and *per se* convey the meaning which the plaintiff would attribute to it, and where a reference to some extrinsic fact is necessary to explain it. (Dorsey *v.* Whipps, 8 Gill, 457; Fry *v.* Bennett, 5 Sandf. 54; Hull *v.* Blandy, 1 Y. & J. 480; Gosling *v.* Morgan, 32 Penn. St. R. 273; Galloway *v.* Courtney, 10 Rich. Law (S. Car.) 414; The State *v.* Neese, 2 Tayl. 270; Cannon *v.* Phillips, 2 Sneed (Tenn.) 185; Edgerly *v.* Swain, 32 N. Hamp. 478; Smith *v.* Gafford, 31 Ala. 35; Lumpkins *v.* Justice, 1 Smith (Ind.), 322.) Where the language is claimed to be *ironical*, it must be so alleged in the inducement. (Boydell *v.* Jones, 4 M. & W. 446; 7 Dowl. Pra. Cas. 210.) In slander the words stated in the declaration were, "Thou set fire to those buildings, and thou wilt never be easy till thou hast told it." There was no introductory averment that the houses had been feloniously burned. A rule for arresting the judgment was made absolute. (Rigby *v.* Heron, 1 Jur. 558.) A complaint on a charge that plaintiff had carried away a deposition taken before a justice of the peace, must show that the deposition was taken in a proceeding in which the justice had jurisdiction, otherwise the carrying away the deposition would not be any criminal offense. (Ayres *v.* Covell, 18 Barb. 260.) Where, in an action of slander brought by an unmarried female, the plaintiff's petition alleged that the defendant had charged her with having given birth to a child, without any averments showing that the hearers understood that the language used conveyed a charge of bastardy, or imputed a want of chastity to the plaintiff, to which petition the defendant demurred, it was held that the demurrer

actionable *per se*, where there is no ambiguity, either in respect to the person whom the language concerns or in respect to the actionable quality of the language, that in such cases no inducement is necessary.[1] Hence it will be perceived that inducement is not, in every case, essential to the sufficiency of a statement of a cause of action, but in those cases only where, without the facts contained in the inducement, the publication would not naturally and *per se* refer to the plaintiff nor convey the meaning the plaintiff contends for, nor be construed as actionable.

§ 309. In England the Common Law procedure act has abrogated the necessity of any matter of inducement in order to show the defamatory meaning of the language published, and enacts that the plaintiff may aver that the matter complained of was used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such matter was used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the matter set forth, with or without the alleged meaning, shows a cause of action, the declaration shall be sufficient.[2]

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should be sustained. (Wilson *v.* Beighler, 4 Iowa, 427.) A charge that plaintiff had "trapped three foxes," was by the aid of inducement made actionable, (Foulger *v.* Newcomb, Law Rep. II, Ex. 327.)

[1] No inducement is necessary where (1) the language is *prima facie* actionable *per se*. (Dorsey *v.* Whipps, 8 Gill, 457; McGough *v.* Rhodes, 7 Eng. 625.) (2) Where the language in its ordinary acceptation imports a charge of crime. (Robinson *v* Keyser, 2 Foster (N. H.), 323; Bricker *v.* Potts, 12 Penn. St. R. 200.) And see Smith *v.* Hamilton, 10 Rich. Law (S. Car.), 41; Goodrich *v.* Davis, 11 Metc. 473. As if the words impute a charge that the plaintiff burnt his barn, with intent to defraud the insurers, it is not necessary to aver that the barn was insured, nor to prove that it was insured. (Case *v.* Buckley, 15 Wend. 327.) And generally it is not necessary to aver facts implied by the alleged defamatory language. If one say of J. S. "He hath killed his cook," it need not be averred that J. S. had any cook. (Holt *v.* Taylor, Sty. 66; and see Billing *v.* Knight, 2 Bulst. 42.) "Thou hast forged the will of R."—it need not be averred that R. was dead, it is implied. (Dorrel *v.* Jay, Vent. 149.) "He hath robbed the Hockly Butcher," need not be averred there is any Hockly Butcher, for if there is not, the fault is the greater. (Smith *v.* Williams, Comb. 247.) See *post*, § 315, and *ante*, note 2, p. 169.

[2] 15 and 16 Vict. ch. 76; Finlason's Com. Law Proc. Act, 137. See Hemmings *v.*

§ 310. In New York, the Code of Procedure of that State dispenses with the necessity of any inducement to show that the plaintiff is the person referred to, by providing that "In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation be controverted the plaintiff shall be bound to establish on trial, that it was so published or spoken."[1] (§ 316.) This statute merely dispenses with the inducement to show the application of the language to the plaintiff; it does not dispense with the necessity of averments of extrinsic facts to show the meaning of ambiguous language. And in New York, where the language published is not defamatory on its face, and becomes so only by reference to extrinsic facts, the existence of those facts must be alleged in the complaint.[2]

§ 311. The matter of inducement, when necessary, is usually inserted prior to the statement of the matter published; but this, although the more orderly arrangement, is not essential; so that the necessary inducement is to be found in the complaint, its location seems immaterial.[3]

Gosson, 27 Law Jour. Q. B. 252; Cox *v.* Cooper, 9 Law Times, N. S. 329; Brembridge *v.* Latimer, 12 Weekly Rep. 878; Watkin *v.* Hall, Law Rep. IV, Q. B. 42. The effect of the decisions appears to be that a declaration containing one count with an innuendo, shall be taken as if there were two counts, one with the innuendo and one without it.

[1] Code of Pro. § 164.

[2] Pike *v.* Van Wormer, 5 How. Pra. Rep, 171; 6 *Id.* 99; Deas *v.* Short, 16 *Id.* 322; Fry *v.* Bennett, 5 Sandf. 54; Blaisdell *v.* Raymond, 4 Abb. Pra. Rep. 446; Hallock *v.* Miller, 2 Barb. 630; Carroll *v.* White, 33 Barb. 615; Bullock *v.* Koon, 9 Cow. 30; and in Massachusetts, the law of 1852, ch. 312, has not dispensed with the necessity of averring the facts which render actionable, words not actionable *per se.* (Tebbetts *v.* Goding, 9 Gray, 254.)

[3] Brittain *v.* Allen, 2 Dev. 120; 3 *Id.* 167; but see what is said Caldwell *v.* Raymond, 2 Abb. Pra. Rep. 193.

§ 312. Where there are several counts in the complaint, each count must be prefaced with appropriate matter of inducement; but where the inducement to one count is applicable to a subsequent count, it may be applied to such subsequent count by reference thereto and without repeating it.[1] In slander, the first count charged a trial, that plaintiff gave evidence, and that the words were spoken of and concerning the trial, &c.; and the third count charged that the words therein set forth, were published of the plaintiff, and of and concerning the action tried as aforesaid, and of and concerning the evidence of the plaintiff given on the said trial as aforesaid. Held, that the third count was sufficient.[2]

§ 312*a*. Where inducement is necessary, it should be stated in a traversable form.[3] Thus, where it was alleged, by way of inducement, that reports were in circulation about the plaintiff, imputing something disgraceful, to which the publication referred, it was held insufficient, and that the reports themselves should have been set forth.[4] And where the alleged libel was the publication of a notice that the plaintiff had married E. E., and the inducement relied upon as making the publication actionable was that E. E. was a common prostitute, but the complaint did not allege this fact otherwise than as follows: "Married, J. W. C." (plaintiff meaning) "to E. E." (meaning a public prostitute known by that name), "that E. E. is a public prostitute, and well known to be so," the complaint was, on demurrer, held insufficient.[5]

§ 313. Where the inducement is essential to the suffi-

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[1] Loomis *v.* Levick, 3 Wend. 205; and see Tindall *v.* Moore, 2 Wilson, 114.

[2] Crookshank *v.* Gray, 20 Johns. 344. See *post*, § 347.

[3] Caldwell *v.* Raymond, 2 Abb. Pra. Rep. 193. And see Cass *v* Anderson, 33 Verm. (4 Shaw), 182; Carter *v.* Andrews, 16 Pick. 1; *post*, § 350 *a*.

[4] Stone *v.* Cooper, 2 Denio, 293.

[5] Caldwell *v.* Raymond, 2 Abb. Pra. Rep. 193.

ciency of the statement of the cause of action, and where, without the facts stated as inducement, no cause of action would be shown, there the existence or non-existence of those facts is material, and of course may be controverted by the defendant; if not controverted they are admitted, and need not be proved;[1] if controverted, they must be proved, as part of the plaintiff's case. But where the inducement is not essential to the sufficiency of the statement of the cause of action, and where, without the facts stated as inducement, a cause of action can be shown, then the inducement is mere surplusage, redundant matter; no material issue can be raised upon it; it should not be controverted, and if controverted need not be proved.[2] An example of superfluous inducement is the preliminary panegyric upon the plaintiff's character, with which it is so customary to preface all complaints for slander or libel. As it is unnecessary to the statement of a cause of action to aver the plaintiff's innocence, either by a general averment of good character, or a general averment of the falsity of the matter published, or by any particular averment, no such averment can be made the subject of an issue.[3]

§ 314. Where the charge was, "He (plaintiff) is a pitiful fellow, and not able to pay his debts," it was held not necessary to aver, by way of inducement, that the plaintiff was no pitiful fellow, and was able to pay his debts;[4] and where the charge was that plaintiff had given money to the defendant as a bribe, it was held, on motion in arrest of judgment, not necessary for the plaintiff to allege that he did not give the money. Where the

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[1] Duke *v.* Jostling, 3 Dowl. 618; Chalmers *v.* Shackell, 6 C. & P. 475.

[2] Cox *v.* Thomason, 2 Cr. & J. 361.

[3] Strachey's Case, Sty. 118.

[4] Hooker *v.* Tucker, Holt R. 39.

[5] Bendish *v.* Lindsey, 11 Mod. 194.

charge was of forging a note, the plaintiff averred, by way of inducement, that the note was genuine, this was held to be immaterial, equivalent only to the customary allegation of innocence, and did not require to be proved;[1] so, where the charge was being guilty of treason, and the plaintiff alleged his innocence, it was held that he did not thereby impose on himself the burden of proving the allegation.[2]

§ 315. It will be convenient here to refer to the rule of pleading and of evidence, that where the defamatory matter states expressly or by necessary implication, the existence of certain facts, the plaintiff may accept the statement and rely upon it, without being obliged either to allege it in his pleading or to establish its truth by evidence;[3] the defendant is estopped from *denying* the truth of his own charge. Thus, where the words of a lawyer were, "He arresteth without taking out writs," or "He is a knave in his practice," it was held that these

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[1] Harman *v.* Carrington, 8 Wend. 488.

[2] Coleman *v.* Southwick, 9 Johns. 45.

[3] Jones *v.* Stevens, 11 Price, 235; *ante*, note 1, p. 505, and *post*, Evidence. For the words, "That is the man who killed my husband," no allegation of the death of the husband is necessary. (Button *v.* Haywood, 8 Mod. 24.) "You hired J. S. to forge a bond;" no allegation that any bond was forged is necessary. (Cro. Car. 337.) In an action by husband and his wife, B., for slander, the declaration reciting that they were lawfully married, and that she was sister of C., and that the defendant falsely, &c., spoke of and concerning the wife and C., that they were not only brother and sister, but man and wife; held that the plaintiff was not bound to prove the introductory averment that the wife was the sister of C., and that the words importing a charge of felony, viz., bigamy, were actionable. (Heming *v.* Power, 10 Mees. & W. 564.) Defendant, on being reminded by plaintiff of a law suit which he (defendant) had recently lost, said, "Yes, your false swearing at that trial." Being told that he had better not again accuse plaintiff of swearing false, he said, "Any man who professed to be a Christian, as you do, and went into the box and swore false, as you did at that trial, had better join the church once more," &c. Defendant also said, "The folks who belonged to the church, and built tall steeples, thought they could swear false, or do anything they had a mind to." Held that the slander admitted that a suit was pending, and it was to be intended that what plaintiff swore to was material, and that the words were sufficient to warrant a finding in favor of the plaintiff, without proof that the suit was in a court of competent jurisdiction, or that plaintiff swore falsely with a corrupt intent. (Kern *v.* Towsley, 51 Barb. 386.)

words implied that the plaintiff was an attorney, and dispensed with any inducement of that fact.[1] And in slander for charging the plaintiff with the crime of murder, it is not necessary to allege, as inducement, the death of the person said to be murdered;[2] and generally it is unnecessary to show that the offense charged could have been committed,[3] or that the plaintiff was physically capable of committing the crime alleged against him.[4]

§ 316. As the plaintiff's right to redress depends entirely upon the fact that the defamatory matter concerned him (§ 131), in order to show a right of action, that fact must appear on the face of the complaint. Where the language published was unequivocal and directly referred to the plaintiff, the colloquium, of which presently, was alone sufficient to show this fact. But where the language was ambiguous in respect to the person to whom it applied, there, formerly, it was necessary; and where the common-law system of pleading prevails, it still is necessary to state as inducement the circumstances which make it apparent that the language does concern the plaintiff;[5] and it was not sufficient to aver generally that the language was published concerning the plaintiff.[6] By statute the rule is otherwise in New York.[7]

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[1] Bell *v.* Thatcher, Freem. 277. And so, where the language was, "He is a paltry lawyer, and plays with both hands." (2 Rolle Rep. 85.)

[2] Tenney *v.* Clement, 10 N. Hamp. 52, and see Carter *v.* Andrews, 16 Pick. 1; Stone *v.* Clark, 21 Pick. 51; Stallings *v.* Newman, 26 Ala. 300; Eckert *v.* Wilson, 10 S. & R. 44; *contra*, Chandler *v.* Holloway, 4 Porter, 17. See *ante*, note 9, p. 223.

[3] Colbert *v.* Caldwell, 3 Grant (Penn.), 181; but see Sawyer *v.* Hopkins, 9 Shep. 268.

[4] Chambers *v.* White, 2 Jones' Law (N. Car.), 383.

[5] Hale *v.* Blandy, 1 Y. & J. 480; and see Brown *v.* Lamberton, 2 Binney, 34; Van Vechten *v.* Hopkins, 5 Johns. 211; Harper *v.* Delph, 3 Ind. 225; Parker *v.* Raymond, 3 Abb. Pra. R. N. S. 343.

[6] The State *v.* Henderson, 1 Rich. 179.

[7] *Ante*, § 310. And there is a like provision in the law of Missouri (Strieber *v.* Wensel, 19 Mis. (4 Bennett), 513); and Wisconsin (Van Slyke *v.* Carpenter, 7 Wis. 173); and Iowa (Swearingen *v.* Stanley, 23 Iowa, 115). "A distinct averment in regard to the person spoken of, and a clear reference of the calumnious words to that

§ 317. We have seen that the actionable quality of language is sometimes affected by the circumstance that it affects the plaintiff in some certain capacity (§§ 132, 179); when, therefore, the plaintiff claims that the language is actionable, because it concerns him in some certain capacity or occupation, and it does not upon its face imply that he is in such capacity or occupation (§ 315), the complaint should properly allege by way of inducement that he filled such capacity, or was in, or carried on, or exercised such occupation *at the time of the publication complained of*. This may be shown by an averment that the plaintiff is of such a trade, or has carried on or exercised it for divers years, without adding last part,[1] because a person once in any certain occupation is presumed to continue therein. (§ 189.) But where the language affects the plaintiff in an office he holds during pleasure, a different rule, it is said, prevails, and the plaintiff's continuance in office must be alleged.[2] The complaint need not allege that the plaintiff gains his livelihood by his occupation (§ 182), nor that the plaintiff has qualified himself for the office or employment in which he is defamed. Thus, where the alleged libel concerned a candidate to serve in Parliament, it was held that the

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person, is all that is required." (Miller *v.* Parish, 8 Pick. 383.) See *post*, §§ 340, 341, and 1 Stark. Slan. 390. Of what is there stated the following is an abridgment: Where the plaintiff's name is mentioned, though a further description be given, the general averment is sufficient (Woodruff *v.* Vaughan, Cro. Eliz. 429) without alleging that the further description applied to the plaintiff; as where the speaking was alleged to be of the plaintiff, and the words were, "T." (meaning the plaintiff) "is thy brother." And where the words were, "Captain Nelson is a thief," held not necessary to allege that plaintiff was a captain or known by that name. Where the plaintiff can show he was intended, he can maintain the action. (*Ante*, note p. 163.) Thus, for the words, "The parson of Dale is a thief," he who was parson of Dale at the time may sue. And where the defendant spoke of that murderous knave Stoughton, held that one Thomas Stoughton might sue. (Sheppard, Action of Slander, 59.)

[1] Tuthill *v.* Milton, Yelv. 159; Cro. Jac. 222; and see 2 Rolle R. 84; Dodd *v.* Robinson, All. 63; Collis *v.* Malin, Cro. Car. 282; Beaumond *v.* Hastings, Cro. Jac. 240.

[2] Tuthill *v.* Milton, Yelv. 159; Cro. Jac 222; and see Gallwey *v.* Marshall, 9 Ex. 300.

declaration need not set out the writ to show the plaintiff was such candidate.[1] But the occupation of the plaintiff should be described in apt terms. Thus, in an action by a barrister, it was held that he should allege he was *homo consiliarius et in jure peritus*, and that it was not sufficient to allege he was *eruditus in lege*.[2] "The declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession."[3]

§ 318. Where the language is actionable of the plaintiff as an individual, then, although it may also affect him in some occupation, it is not necessary to allege as inducement that the plaintiff exercised such occupation; and even if alleged, it need not be proved, because there is a cause of action without it. (§ 179.)[4] Thus, in an action for setting up near plaintiff's house an inscription insinuating that it was a house of ill-fame, &c., the declaration alleged that the plaintiff carried on the business of a retailer of wines; but the court held, that as the inscription was not alleged to have been published concerning the plaintiff as a retailer of wine, it might be struck out of the declaration, and need not be proved.[5] and in like manner, if the plaintiff has two trades, and both are alleged as inducement, and the language is actionable as affecting the plaintiff in one of them, proof of his exercising that one trade will suffice.[6]

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[1] Harwood *v.* Astley, 1 New R. 47; and *post*, § 320.

[2] 1 Stark. Slan. 402. A complaint setting forth that the plaintiff was "engaged in the wooden ware business," sufficiently describes his employment as that of a buyer and seller of wooden ware. (Carpenter *v.* Dennis, 3 Sandf. 305.)

[3] Denman, C. J., Ayre *v.* Craven, 2 Adol. & El. 2; 4 Nev. & M. 220; and see Alexander *v.* Angle, 1 Cromp. & J. 143.

[4] Gage *v.* Robinson, 12 Ohio, 250.

[5] Spall *v.* Massey, 2 Stark. R. 559.

[6] Figgins *v.* Cogswell, cited Chalmers *v.* Shackell, 3 C. & P. 477; 3 M. & S. 369. See *post*, note 2, p. 535. But where the plaintiff alleged that he was proprietor and

§ 319. Too great minuteness in matter of inducement is to be avoided, because, in general, the proof must be co-extensive with the allegation; as where the plaintiff alleged that he was an attorney, that he conducted a particular suit, and afterwards alleged that the defamatory matter was concerning his conduct in that suit, it was held that he must prove the existence of that suit.[1] And in an action for a libel on a constable, respecting his conduct in the apprehension of persons stealing a dead body, and part of the conduct stated in the first count was that of carrying the dead body to Surgeons' Hall, and the second count spoke of "his conduct respecting the said dead body," the court held that it was necessary in both counts to prove the introductory allegation that the body was carried to Surgeons' Hall; for the words, "the said body," in the second count, incorporated all the descriptive circumstances introduced in the first; the plaintiff need not have burthened himself with the proof of such a fact; but the libel being stated to be of and concerning his conduct as to the dead body, it became most important to prove that part of his conduct.[2] But it is said,[3] "The omission to prove facts unnecessarily alleged will not be fatal unless by the form and mode of pleading they have been made descriptive of that which is material."

§ 320. In need not be alleged that the plaintiff was *legally qualified* or *licensed* to exercise the calling in which the language affects him; if he was not so qualified or licensed, it is matter of defense to come from the defendant. In an action for slander, the plaintiff alleged

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editor of a newspaper, it was held insufficient for him to prove himself proprietor only. (Heriot *v.* Stewart, 4 Esp. 437.)

[1] Parry *v.* Collis, 5 Esp. 339.

[2] Teesdale *v.* Clement, 1 Chit. 603.

[3] 1 Stark. Sland. 407.

that he was *in medicinis doctor*, and it was moved in arrest of judgment that he did not show he was licensed, but adjudged for the plaintiff.[1] And so in an action by a physician for words of him in his profession, it is sufficient for him to aver that he had used and exercised the profession of a physician; but where a plaintiff in such a case went further, and averred that he was a physician, and had duly taken the degree of a doctor of physic, it was held that he must prove his degree as stated.[2]

§ 321. In a complaint founded upon a charge of *false swearing* as a witness, such a charge not being actionable *per se* (§ 171), to show a cause of action there should be an *inducement* of the pendency of a suit or judicial proceeding, in which the plaintiff was examined as a witness, and a *colloquium* that the charge was concerning the plaintiff as such witness.[3] If there were several suits between the same parties, tried on the same day, it is not necessary, it seems, to distinguish in which suit the false swearing occurred.[4] And where the suit or proceeding was before a court or officer of limited jurisdiction, it must be further shown that such court or officer had jurisdiction of the suit or proceeding; an averment that the justice then and there had jurisdiction of the action was held sufficient without setting forth the facts which gave

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[1] Dr. Brownlow's Case, Mar. 116, pl. 3; and *ante*, §§ 182, 183, 189.

[2] Moises *v.* Thornton, 8 T. R. 303.

[3] Stone *v.* Clark, 21 Pick. 51; Gale *v.* Hays, 3 Strobh. 452; Sharp *v.* Wilhite, 2 Humph. 434; Williams *v.* Spears, 11 Ala. 138; and *semble* it should be alleged that defendant intended to impute a charge of perjury. (Wood *v.* Scott, 13 Verm. 42; Sanderson *v.* Hubbard, 14 *Id.* 462.) It is not necessary to state what the witness testified. (Whitaker *v.* Carter, 4 Ired. 461.) A complaint for slander set out that in a suit before a justice, P. W. was a witness to material matter; that defendant, in a conversation concerning said trial and concerning the plaintiff, being guilty of subornation of perjury, published, &c., the words, "P. F. swore to a lie, and you (plaintiff) hired him." It was objected to the complaint that it did not allege that the conversation was of and concerning the testimony of P. F. on the trial. Held, after verdict, the complaint was good. (Shimer *v.* Bronnenburg, 18 Ind. 363.)

[4] Harris *v.* Purdy, 1 Stew. 231.

the jurisdiction.[1] The plaintiff need not show that the justice was duly commissioned.[2] A declaration which alleged that the words were spoken "whilst the plaintiff was giving testimony as a witness under the solemnities of an oath, before an acting justice of the peace,"[3] and a declaration which alleged that the plaintiff was, at the instance of the defendant, examined on oath administered by a justice, according to law, as a witness for the defendant, were held sufficiently to allege jurisdiction.[4] "Squire H." was held a sufficient description of P. H., esquire, a justice of the peace.[5]

§ 322. It should be alleged that the testimony was material to the point in issue, but it is not necessary to show to what particular degree, the point in respect to which a party is charged with false swearing, was material to the issue. If it goes to prove a material circumstance or link in the chain of evidence it is sufficient.[6] And it has been said that an averment of the materiality

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[1] Sanford *v.* Gaddis, 13 Ill. 329.

[2] Pugh *v.* Neal, 4 Jones' Law (N. Car.), 367. It was held not necessary to allege either that the justice had jurisdiction or that the testimony was material. (Dalrymple *v.* Lofton, 2 M'Mullan, 112.) But as to the necessity of alleging jurisdiction, see Shellenbarger *v.* Norris, 2 Carter (Ind), 285; Jones *v.* Marrs, 11 Humph. 214; Chapman *v.* Smith, 13 Johns. 78; Bonner *v.* McPhail, 31 Barb. 106; Cannon *v.* Phillips, 2 Sneed (Tenn.) 185.

Where the charge is that the plaintiff committed *perjury*, that implies a false swearing before a competent tribunal, and jurisdiction need not be alleged. (Green *v.* Long, 2 Cai. 91.) Where the charge is perjury committed in a foreign state, it must be averred that by the laws of such state perjury is an offense to which is annexed an infamous punishment. (Sparrow *v.* Maynard, 8 Jones' Law (N. Car.), 195; and see *ante*, note 6, p. 213.)

[3] Lewis *v.* Black, 27 Miss. (5 Cush.) 425.

[4] Shellenbarger *v.* Norris, 2 Carter (Ind.), 285.

[5] Call *v.* Foresman, 5 Watts, 331; and see *ante*, note 4, p. 193; "N. T., esquire, aforesaid," held sufficient description of a justice of the peace. (Canterbury *v.* Hill, 4 Stew. & Port. 224.)

[6] Hutchins *v.* Blood, 25 Wend. 413; and see Witcher *v.* Richmond, 8 Humph. 473; Shroyer *v.* Miller, 3 W. Vir. 158; Hogan *v.* Wilmarth, 16 Grat. 80; note to § 171, *ante*.

of the evidence may be altogether omitted;[1] at least the absence of such an allegation will be cured by verdict.[2] It is not necessary to allege that the justice had authority to administer the oath.[3] But it should be alleged that the plaintiff was legally sworn.[4] The defendant cannot show as a defense that the plaintiff was not a competent witness.[5] The absence of allegations of jurisdiction in the justice, or materiality of the testimony, may be cured by a plea of justification,[6] or by a verdict.[7]

§ 323. Properly the colloquium or allegation of *a discourse* is the allegation that the language published was concerning the plaintiff, or concerning the plaintiff and his affairs, or concerning the plaintiff and the facts alleged as inducement. But the term colloquium is frequently employed as synonymous with inducement, or to signify the inducement and the colloquium properly so called. As heretofore stated (§§ 310, 316) it must be shown on the face of the complaint that the language was published concerning the plaintiff, and the proper mode of doing this is by a direct averment that the publication was "of and concerning the plaintiff." This averment may, how-

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[1] Wetsel *v.* Lennen, 13 Ind. 535; Cannon *v.* Phillips, 2 Sneed, 185; Wolbreiht *v.* Baumgarten, 26 Ill. 291; Harbison *v.* Shook, 41 Ill. 142.

[2] Niven *v.* Munn, 13 Johns. 48. In slander for the charge of perjury, the materiality of the alleged false testimony is for the court to determine, and if left to the jury it is error. (Steinman *v.* McWilliams, 6 Barr, 170; Power *v.* Price, 12 Wend. 500, affirmed 16 Wend. 450.) Or ground for a new trial. (Dalrymple *v.* Lofton, 2 M'Mullan, 112.)

[3] Sanford *v.* Gaddis, 13 Ill. 329; but see Jones *v.* Marrs, 11 Humph. 214.

[4] Sanderson *v.* Hubbard, 14 Verm. 462.

[5] Harris *v.* Purdy, 1 Stew. 231. A declaration in slander, charging the words spoken as follows: "He (meaning plaintiff) has sworn falsely," &c., "against me (meaning defendant), and *he* (meaning defendant) could prove it," was held bad after verdict; by "he" in the latter clause, as pleaded, the defendant could not have meant himself. (Bowdish *v.* Peckham, 1 Chip. 146.) But see *post*, note to § 343.

[6] Witcher *v.* Richmond, 8 Humph. 473; Attebury *v.* Powell, 29 Miss. (8 Jones) 429; Sanderson *v.* Hubbard, 14 Verm. 462.

[7] Palmer *v.* Hunter, 8 Mis. 512; Morgan *v.* Livingston, 2 Rich. 573; Niven *v.* Munn, 13 Johns. 48; but see Wood *v.* Scott, 13 Verm. 42.

ever, be supplied by any equivalent allegation, and may be altogether dispensed with where it appears otherwise with sufficient certainty on the face of the complaint that the publication was in fact concerning the plaintiff.[1] And although, in actions for slander and libel, inducement may be necessary to explain the matter alleged to be libellous, it is enough to state in the declaration that the publication was "of and concerning" the plaintiff, without also stating that it was "of and concerning" such matter,[2] or of and concerning the plaintiff in the occupa-

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[1] It is sufficient to aver substantially that the words were spoken of plaintiff; an express averment of the fact is not necessary. (Brown *v.* Lamberton, 2 Binn. 34; Brashen *v.* Shepherd, Ky. Dec. 294; Nestle *v.* Van Slyke, 2 Hill, 282; but see Titus *v.* Follett, 2 Hill, 318; Tyler *v.* Tillottson, 2 Hill, 508; Cave *v.* Shelor, 2 Munf. 193; Harper *v.* Delp, 3 Ind. 225; Rex *v.* Marsden, 4 M. & S. 164; Baldwin *v.* Hildreth, 14 Gray (Mass.) 221.) On demurrer, where the words did not name the plaintiff, the omission of a colloquium of and concerning the plaintiff was held fatal, and not aided by the innuendoes. (Milligan *v.* Thorn, 6 Wend. 412; and see Church *v.* Bridgman, 6 Miss. 190.) Nor by the verdict, the language being in the third person. (Sayre *v.* Jewett, 12 Wend. 135.) If there be a colloquium sufficient to point the application of the words to the plaintiff, if spoken maliciously, he must have judgment. (Lindsey *v.* Smith, 7 Johns. 359.) Where actionable words are spoken to a plaintiff, it is sufficient to allege a discourse with him, without an averment that the words were concerning the plaintiff; but where the words are in the third person, as, "He is a thief," there, although a discourse of the plaintiff is alleged, it must also be alleged that the words were concerning the plaintiff. And it is not sufficient in such a case to connect the words with the plaintiff by an innuendo. (1 Stark. Sland. 384.) But where a discourse of the plaintiff is laid, and there is an innuendo of the plaintiff, it seems that the want of a direct averment that the words were concerning the plaintiff must be pointed out by special demurrer [motion to make certain]; but if no discourse concerning the plaintiff is alleged, then the want of an allegation that the words concerned him would be a defect in substance. (*Id.*; Skutt *v.* Hawkins, 1 Rolle R. 244.) If a plaintiff has omitted, in his declaration, to state that the libel was spoken of himself, he may supply the same by parol evidence. (Newbraugh *v.* Curry, Wright, 511.) Where A. says of B. & C., "*you* have committed such an offense," though B. & C. may have separate actions, the words must be alleged to have been spoken of both. (Cro. Car. 512.) Where the declaration states a colloquium with G., of and concerning the children of G., and of and concerning C., one of the children of G., and the plaintiff in the suit, in particular, and that the defendant said, "Your children are thieves, and I can prove it," the colloquium conclusively points the words, and designates the plaintiff as one of the children intended. And a colloquium is sufficient to give application to words still more indefinite. (Gidney *v.* Blake, 11 Johns. 54; but see what is said 1 Stark. Sland. 385; see also *ante*, § 129.)

[2] O'Brien *v.* Clement, 4 D. & L. 563; Gutsole *v.* Mathers, 1 M. & W. 495; Shimer *v.* Bronnenburg, 18 Ind. 363.

tion alleged in the inducement.[1] Where the declaration alleged that the defendant published a libel of and concerning the plaintiff, containing, &c., the false libellous matters following (without saying of and concerning the plaintiff); held, in error, that for want of an averment that the particular matter was of and concerning the plaintiff, and there being no innuendo that such matter related to him, the declaration was bad, and a *venire de novo* was awarded.[2] A declaration which alleged that the plaintiffs were traders under the firm of T. & Co., and averring that, in a discourse of and concerning them, their circumstances and business, the defendant said, "T. & Co. are down," &c., without repeating that this was said of and concerning the plaintiffs, was held bad on special demurrer, although good in substance.[3]

§ 324. A publication by the defendant must be alleged. The publication need not be set forth in any technical form of words.[4] But it must be alleged positively, and not by way of recital;[5] and, therefore, a declaration which commenced, "For that *whereas*" the defendant intending, &c., spoke, &c., was held bad on special demurrer.[6] In slander for English words, it should be alleged that the defendant spoke the words in the presence and hearing of *divers* persons,[7] or of certain

[1] Wakley *v.* Healey, 18 Law Jour. Rep. 241, C. P.; *contra*, see Barnes *v.* Trundy, 31 Maine (1 Rid.), 321.

[2] Clement *v.* Fisher, 7 B. & Cr. 459; 1 M. & Ry. 281.

[3] Titus *v.* Follett, 2 Hill, 318; and see Taylor *v.* The State, 4 Geo. 14.

[4] Baldwin *v.* Elphinstone, 2 W. Black. 1037, *ante*, n. 2, p. 143. It was held sufficient to allege that the defendant was the proprietor of the newspaper in which the alleged libel was published. (Hunt *v.* Bennett, 19 N. Y. 173.)

[5] Donage *v.* Rankin, 4 Munf. 261.

[6] Brown *v.* Thurlow, 4 D. & L. 301; 16 M. & W. 36; Coffin *v.* Coffin, 2 Mass. 358; Houghton *v.* Davenport, 23 Pick. 235.

[7] To allege a speaking merely, is not sufficient. (Style, 70; 1 Stark. Sland. 360.) In Indiana, by statute it is sufficient merely to allege the speaking. (Girard *v.* Risk, 11 Ind. 156.) And so in Missouri (Atwinger *v.* Fellner, 46 Misso. 276; Steiber *v.* Wensel, 19 Mid. 513), and held that an averment that the defendant "did, in certain

persons, naming them,[1] or of certain persons named and divers others, not naming the others.[2] Published *ex vi termini*, imports a speaking in the presence and hearing of a third party;[3] and, therefore, to allege that the defendant *published* the words is sufficient, without averring specially the presence of others.[4] And an allegation that the words were spoken would be sufficient, without stating the presence of any third person, if accompanied by any averment which necessarily implies a publication to a third person—as that the defendants *palim et publicé promulgant de querente*.[5] In the case of English words, it is not necessary to allege that the persons present either heard or understood what was said; for until the contrary is made to appear, it will be intended that those present both heard and understood the words; but in the case of a publication of foreign words, it must be alleged that the persons present understood them.[6]

§ 325. Where the publication was made in writing, *published* is the proper and technical term by which to allege the publication, and this without reference to the precise degree in which the defendant was instrumental to the publication.[7] But any equivalent allegation will

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conversations, utter, publish, and declare," sufficiently implies that the words were spoken in the presence of other persons. (Hurd *v.* Moore, 2 Oregon, 85.)

[1] Burbank *v.* Horn, 39 Maine (4 Heath), 233; *ante*, n. 4, p. 143.

[2] Bradshaw *v.* Perdue, 12 Geo. 510; Ware *v.* Cartledge, 24 Ala. 622.

[3] Duel *v.* Agan, 1 Code Rep. 134; *ante*, n. 4, p. 143.

[4] Barton *v.* Barton, 3 Iowa, 316.

[5] Taylor *v.* How, Cro. Eliz. 861. Prior to the statute 2d Geo. II, ch. 14, pleadings in the courts of England were in Latin, which will explain why the quotations from the pleadings in the early decisions are in Latin.

[6] Warmuth *v.* Cramer, 3 Wend. 394; 1 Stark. Slan. 360; Cro. Eliz. 396, 480, 865; Cro. Jac. 39; Cro. Car. 199; Noy, 57; Golds. 119; Zerg *v.* Ort, 3 Chandler, 26; and see *ante*, notes p. 139. After verdict, a declaration which alleges words spoken in a foreign language, without alleging that the words were understood by the hearers, was sustained (Kiene *v.* Ruff, 1 Clarke (Iowa), 482); and in Pennsylvania, held not necessary to allege that foreign words were understood (Palmer *v.* Harris, 60 Penns. 156).

[7] Lamb's Case, 9 Rep. 59; 1 Stark. Sland. 359.

suffice. Where it was alleged that the defendant printed and caused to be printed in the St. James' Chronicle, that was held sufficient;[1] and so was the allegation that the defendant "did publish *and* cause and procure to be published," a certain libel addressed to the plaintiff,[2] but where the allegation was that the defendant *scripsit fecit, et publicavit seu scribi fecit et publicari causavit*, it was held to be insufficient, and judgment was arrested on account of the uncertainty of the disjunctive charge.[3] To allege that the defendant is proprietor of a certain newspaper named, and that the libel was published in such paper, was held a sufficient averment of a publication by the defendant.[4] But to allege that defendant sent a letter to plaintiff which was received and read by him, does not show a sufficient publication.[5] If a defamatory writing is shown to have been put in a situation in which it might have been read, it is unnecessary to allege that it was in fact seen or read.[6]

§ 326. The place of publication may be alleged with a *videlicet*.[7] It is not material, and need not be proved as laid.[8]

§ 327. The time of speaking the words is not material.[9] In one case, it was held that the words might be laid with a *continuando*,[10] but this was denied

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[1] Baldwin *v.* Elphinstone, 2 W. Black. 1037.

[2] Waisted *v.* Holman, 2 Hall, 172. But to allege that defendant composed, wrote, and delivered a certain libel addressed to the plaintiff, was held insufficient. (*Id.*)

[3] Rex *v.* Brereton, 8 Mod. 328.

[4] Hunt *v.* Bennett, 4 E. D. Smith, 647, affirmed 19 N. Y. 193.

[5] Lyle *v.* Clason, 1 Cai. 581.

[6] Giles *v.* The State, 6 Geo. 276; *ante*, n. 2, p. 142.

[7] Burbank *v.* Horn, 39 Maine (4 Heath), 233.

[8] Jeffries *v.* Duncombe, 11 East, 226; *ante*, § 110.

[9] Potter *v.* Thompson, 22 Barb. 87; Hosley *v.* Brooks, 20 Ill. 115; but see *ante* § 109.

[10] Burbank *v.* Horn, 39 Maine (4 Heath), 233.

on the ground that words spoken at one time constitute one cause of action, and words spoken at another time constitute another cause of action.[1] The *continuando*, however, was held to be surplusage, and not ground for special demurrer.[2] An allegation, "and further, that defendant, on divers days and times, between that day and the commencement of this action, spoke the same words," was struck out as redundant.[3]

§ 328. It should appear on the face of the complaint, by some appropriate averment, that the publication was made *without legal excuse*. *Ex malitia*, in its legal sense, imports a publication that is false, and made without legal excuse;[4] an averment that the publication was made with malice or maliciously has ever been and still is the customary averment; but any form of words from which malice (absence of excuse) can be inferred, as that the publication was made falsely or wrongfully, will suffice.[5] Neither the term malice,[6] nor falsely, nor wrongfully, is essential,[7] at least after verdict.[8] A declaration which charged the publication to be "malicious, injurious, and and unlawful," was held sufficient.[9] Where it appeared on the face of the declaration that the defamatory matter was published in an affidavit in a proceeding in an action, and was pertinent to the matter in hand, held that the declaration was demurrable, because, notwithstanding the

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[1] Swinney *v.* Nave, 22 Ind. 178; *ante*, § 113.

[2] Cummins *v.* Butler, 3 Blackf. 190.

[3] Gray *v.* Nellis, 6 How. Pra. Rep. 290.

[4] Johnson *v.* Sutton, 1 T. R. 439; Cro. Car. 271; Rowe *v.* Roach, 1 M. & S. 304; *ante*, §§ 71, 73.

[5] Moor, 459; Owen, 451; Noy, 35; *ante*, note 3, p. 122.

[6] Opdyke *v.* Weed, 18 Abb. Pra. Rep. 223; Viele *v.* Gray, 10 *Id.* 6; *ante*, note 1, p. 131.

[7] Style, 392. An allegation that the publication was a libel, held equivalent to an allegation that it was false and malicious. (Hunt *v.* Bennett, 19 N. Y. 176.)

[8] 2 Saund. 242; White *v.* Nichols, 3 How. U. S. Rep. 266, 284; Taylor *v.* Kneeland, 1 Doug. 67.

[9] Rowe *v.* Roach, 1 Man. & Sel. 304.

allegation that the publication was false and malicious, it appeared on the face of the declaration that the publication was a privileged one.[1]

§ 329. The complaint should set out, and purport to set out, the very words published.[2] The proper term by which to indicate that the very words are set forth is *tenor*.[3] "Tenor and effect" is now held to be sufficient, but there is a decision to the contrary.[4] It is not sufficient to allege that words were published to the effect follow-

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[1] Garr *v.* Selden, 4 N. Y. 91.

[2] Finnerty *v.* Barker, 7 N. Y. Legal Observer, 317; Sullivan *v.* White, 6 Irish Law Rep. 40; Whitaker *v.* Freeman, 1 Dev. 271; Lee *v.* Kane, 6 Gray (Mass.), 495; Taylor *v.* Moran, 4 Met. (Ky.), 127; Commonwealth *v.* Wright, 1 Cush. 46. In Gutsole *v.* Mathers, 1 M. & W. 495, the precise words were not set out, but merely the effect of them, the declaration alleging that the defendant wrongfully, &c., represented in the presence and hearing of divers persons (naming them) that said tulips were stolen property. On motion in arrest of judgment, the declaration was held bad for not setting out the words *verbatim*. In Pennsylvania, it has been held not necessary to set out the identical words complained against, and that to set forth their purport is sufficient. (Lukehart *v.* Byerly, 53 Penns. 418.) See *ante*, note 3, p. 277. A new trial was granted because the words published were not set forth in the complaint literally. (Walsh *v.* The State, 2 McCord, 248.) Where the substance only of the defamatory matter was charged in the declaration for libel, the court, on the trial, allowed the plaintiff to amend by setting out *verbatim* the letter containing the matter complained against. (Saunders *v.* Bates, 1 Hurl. & N. 402.) Certain States provide by statute what words shall be actionable. (§ 153.) It is held that acts declaring what words are actionable are public laws, of which courts are bound to take notice, and the complaint or declaration need not recite or refer to the statute (Sanford *v.* Gaddis, 13 Ill. 329; Elam *v.* Badger, 23 Ill. 498), except by alleging that the words were published against the form of the statute in such case provided (Terry *v.* Bright, 4 Md. 430); but the absence of this allegation will be cured by verdict. (Wilcox *v.* Webb, 1 Blackf. 258.) As to declaring upon the statutes of Virginia and Georgia, see Moseley *v.* Moss, 6 Gratt. 534; Holcombe *v.* Roberts, 19 Geo. 588; Hanks *v.* Palton, 18 Geo. 52.

[3] Commonwealth *v.* Wright, 1 Cush. 46; Wright *v.* Clements, 3 B. & Ald. 503. To allege "a certain receipt for money, as follows, that is to say," was held equivalent to an allegation "according to the tenor following, or in the words and figures following, that is to say." (Rex *v.* Powell, 1 Leach C. C. 77, 4th ed.; 2 East P. C. 976; 2 Wm. Black. R. 787.) In a declaration for slander of plaintiff in his trade, a count alleging that the defendant, in a certain discourse in the presence and hearing of divers subjects, falsely and maliciously charged the plaintiff of being in insolvent circumstances, and stating special damage, but without setting out the words, was held ill. (Cook *v.* Cox, 3 M. & S. 110.)

[4] Newton *v.* Stubbs, 3 Mod. 71; 2 Show. 435.

ing,[1] or in substance as follows,[2] or purporting,[3] or that the words were in substance as follows, or according to the purport and effect following, or in manner and form following,[4] or that the words were of a certain tenor, import and effect.[5] Nor are quotation marks sufficient to indicate that the exact words are set forth.[6] Where the defamation consists in the adoption of words spoken by another, the declaration must set forth the words with the same particularity as though the action were against that other.[7]

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[1] Ford *v.* Bennett, 1 Ld. Raym. 415; Rex *v.* Bear, 2 Salk. 417.

[2] Wright *v.* Clements, 3 B. & Ald. 503. Where a declaration for a libel sets out a publication which refers to a previous publication, but, unless by reference to the language of the previous publication, contains no libel, such previous publication must be considered as incorporated in the publication complained of, and must appear in the declaration to be set out *verbatim*, and not merely in substance. Therefore judgment was arrested as to the second count of a declaration, which, after reciting that defendant published a statement "*in substance* as follows," setting out the publication charged in the first count, charged that defendant afterwards published of and concerning plaintiff, and of and concerning the first publication, a statement that the copper tank was fitted up in a schooner belonging to plaintiff. (Solomon *v.* Lawson, 8 Q. B. 823.)

[3] Wood *v.* Brown, 6 Taunt. 169; and see Cook *v.* Cox, 1 M. & S. 110, alleging the speaking of certain words, or words of the same import, was held good after verdict. (Bell *v.* Bugg, 4 Mumf. 260.)

[4] Bagley *v.* Johnson, 4 Rich. 22; Watson *v.* Music, 2 Mis. 29; Zeig *v.* Ort, 3 Chand. (Wis.) 26; Bassett *v.* Spofford, 11 N. Hamp. 127; Churchill *v.* Kimball, 3 Ham. 409; Rex *v.* May, 1 Doug. 193. A count in slander stating that defendant charged plaintiff with the crime of forgery; held bad (Yundt *v.* Yundt, 12 S. & R. 427); and so of perjury (Ward *v.* Clark, 2 Johns. 10); and where a count alleged that defendant charged plaintiff with the crime of theft, without setting out the exact words, it was held bad after verdict. (Parsons *v.* Bellows, 6 N. Hamp. 289.) In Massachusetts, even before the statute of 1852, it was held sufficient to allege that defendant accused plaintiff of a certain crime, as stealing, without setting out the words spoken (Pond *v.* Hartwell, 17 Pick. 269; Allen *v.* Perkins, *Id.* 369; Gardner *v.* Dyer, 5 Gray, 22; Nye *v.* Otis, 8 Mass. 122; Whiting *v.* Smith, 13 Pick. 364; Gay *v.* Horner, 13 Pick. 535; and see Kennedy *v.* Lowry, 1 Binn. 393; Grubs *v.* Keyser, 2 McCord, 305); but in that State the defendant is entitled to a bill of particulars setting forth the exact words. (See Payson *v.* Macomber, 3 Allen, 71.) A count in slander alleging that defendant wrongfully and without reasonable cause "imposed the crime of felony" upon the plaintiff was, after verdict, held good. (Davis *v.* Noakes, 1 Stark. 377; Hill *v.* Miles, 9 N. Hamp. 9.) In actions for malicious prosecution, it is sufficient to declare *quod crimen felonice imposuit*, without stating the words. (Pippet *v.* Hearn, 5 B. & Ald. 634; Blizard, *v.* Kelly, 2 B. & C. 283; Davis *v.* Noake, 6 M. & S. 33.)

[5] Forsyth *v.* Edmiston, 5 Duer, 653.

[6] Commonwealth *v.* Wright, 1 Cush. 46.

[7] Blessing *v.* Davis, 24 Wend. 100.

§ 330. Where the words were published in a foreign language, the foreign words must be set forth,[1] together with a translation into English. To set forth the foreign words alone, or the translation alone, would not be sufficient.[2] The omission to set forth a translation may be rectified by an amendment.[3] On a general denial, the plaintiff must prove the correctness of the translation, but its correctness is admitted by a demurrer.[4] To allege a publication of English words, and prove a publication of words in another tongue is a variance,[5] and cause for a nonsuit.[6]

§ 331. The object, or one of the objects, of obliging a plaintiff to set forth in his complaint the very words complained against, is, that the defendant may, if he desires it, by demurring, have the opinion of the court upon the actionable quality of the words.[7]

§ 332. One exception to the rule now under consideration is said to be, when the words published are so obscene as to render it improper that they should appear upon the record, and in such case the statement of the words may be omitted altogether, and a description substituted; but the reason for not setting forth the exact words must appear by proper averments on the face of the complaint.[8]

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[1] Zenobia *v.* Axtell, 6 T. R. 162.

[2] Wormouth *v.* Cramer, 3 Wend. 394; Setterman *v.* Ritz, 3 Sandf. 734; Zeig *v.* Ort, 3 Chand. 26; Kerschbaugher *v.* Slusser, 12 Ind. 453; Hickley *v.* Grosjean, 6 Blackf. 351; Rehauser *v.* Schwerger, 3 Watts, 28.

[3] Zenobia *v.* Axtell, 6 T. R. 162; Rehauser *v.* Schwerger, 3 Watts, 28; Jenkins *v.* Phillips, 9 C. & P. 766. An amendment was allowed by inserting the foreign words. (Deboux *v.* Lehind, 1 Code Rep. N. S. 235.) See *Variance.*

[4] Hickley *v.* Grosjean, 6 Blackf. 351.

[5] Keenholts *v.* Becker, 3 Denio, 346; Kerschbaugher *v.* Slusser, 12 Ind. 453.

[6] Zenobia *v.* Axtell, 6 T. R. 162; Zeig *v.* Ort, 3 Chand. 26.

[7] Wood *v.* Brown, 6 Taunt. 169.

[8] Com'wealth *v.* Tarbox, 1 Cush. 46; Cem'wealth *v.* Holmes, 17 Mass. 336. In-

§ 333. The omission to set forth in the declaration the very words published is a variance, and in the practice at common law the omission was not cured by verdict, and might be taken advantage of by motion in arrest of judgment.[1] The degree of certainty with which the defamation must be set forth depends upon the subject-matter. Where the defamation consists mainly in postures and movements, the use of language somewhat general is unavoidable; and where a declaration alleged, that the defendant published of and concerning a certain court-martial, and of and concerning the plaintiff as a member thereof, a defamatory libel and caricature, consisting of a picture representing and pointing out the court-martial, and the plaintiff as a member thereof, by their position and certain grotesque resemblances, &c., it was held, after verdict, to be averred with sufficient certainty that the plaintiff was specifically and individually libelled.[2]

§ 334. The rule now under consideration does not render it necessary to set forth the whole of the matter published; it is sufficient to set forth the particular passages complained of, provided they are divisible from and their meaning is not affected by the other and omitted passages.[3] It is sufficient to set out the words which are

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decent words tending only to aggravate the damages need not be repeated in the declaration. (Stevens *v.* Handley, Wright (Ohio.), 121.)

[1] Gutsole *v.* Mathers, 1 M. & W. 495; Wright *v.* Clements, 3 B. & A. 503. And see *Variance.*

[2] Ellis *v.* Kimball, 16 Pick. 132. Judgment was arrested in an action for slander respecting a bribe, because the charge did not specify to whom the money was given. (Purdy *v.* Stacey, 5 Burr. 2698.) A declaration in slander for charging the plaintiff with larceny, held good after verdict, although it did not set forth the name of the owner of the property alleged to have been stolen by plaintiff. (Thompson *v.* Barkley, 27 Penn. St. R. 263.) It is not necessary to set forth the imputation of an offense with the same particularity as in an indictment. (Id.; Niven *v.* Munn, 13 Johns. 48.)

[3] Culver *v.* Van Anden, 4 Abb. Pra. Rep. 374; Rex *v.* Brereton, 8 Mod. 329; Sidman *v.* Mayo, 1 Roile R. 429. A document referred to in an alleged libel need not be set out if it does not affect the meaning of the language complained against (Walsh *v.* Henderson, 4 Ir. L. R. 34.)

material, and additional words, which do not diminish nor alter the sense of the words truly alleged; may be omitted.[1] But enough must be set forth to show the sense and connection in which words set forth were used; otherwise there will be a variance, even if the precise words laid are proved to have been spoken.[2] Where several passages are extracted from the same publication, care should be taken to show that such is the case, as by prefacing the first extract, with the allegation, in a certain part of which said libel there was and is contained, &c., and by prefacing the subsequent extracts with the allegation, and in a certain other part of which said libel there was and is contained, &c.[3] But unless the insertion of the whole matter published would be oppressive and embarrassing, there is no objection to setting forth the whole of the matter published. Thus, where in slander the words set out were, "*Your wife is a damned Irish woman, and has got the palsy, and your son is insane*, and you are a damned thief," the court, on motion, refused to strike out as redundant the words in *italic*.[4] In an unreported case in New York, in which the plaintiff set out, without innuendoes, the whole of the publication (nearly an entire column in a newspaper), on defendant's motion an order was made requiring the plaintiff tospecify the particular passages on which he relied as defamatory.

§ 335. It is an elementary rule of pleading that whatever is alleged must be alleged with certainty; and one of the means of ensuring certainty in a complaint for slander or libel is an *innuendo*.[5] Among the attempts to define an innuendo and explain its function are the follow-

[1] Spencer *v.* McMasters, 16 Ill. 405; Weir *v.* Hoss, 6 Ala. 881; Buckingham *v.* Murray, 2 Car. & P. 46.

[2] Edgerly *v.* Swain, 32 N. Hamp. 478.

[3] Tabert *v.* Tipper, 1 Camp. 350; Cooke *v.* Hughes, 1 Ry. & M. 112.

[4] Deyo *v.* Brundage, 13 How. Pra. Rep. 221.

[5] Rodeburgh *v.* Hollingsworth, 6 Ind. 339. Where the language directly and in

ing: The office of an innuendo is to aver the meaning of the language published.[1] An innuendo means nothing more than the words "*id est*," "scilicet or "*meaning*" or "*aforesaid*," as explanatory of a matter sufficiently expressed before.[2] It is in the nature of a *prædict.* It may serve for an explanation, to point a meaning where there is precedent matter, expressed or necessarily understood or known, but never to establish a new charge. It may apply what is already expressed, but cannot add to nor enlarge nor change the sense of the previous words.[3] If the words before the innuendo do not sound in slander, no meaning produced by the innuendo will make the action maintainable, for it is not the nature of an innuendo to beget an action.[4] An innuendo helps nothing unless the words precedent have a violent pre-

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terms free from ambiguity is actionable, no innuendo is necessary. (Worth *v.* Butler, 7 Blackf. 251; Roella *v.* Follow, *id.* 377.)

[1] Watson *v.* Nicholas, 6 Humph. 174. The office of the innuendo is to explain doubtful words or phrases, and annex to them their proper meaning. It cannot extend their sense beyond their usual and natural import, unless something is put upon the record by way of introductory matter with which they can be connected. In such case, words which are equivocal or ambiguous, or fall short, in their natural sense, of importing any libellous charge, may have fixed to them a meaning, certain and defamatory, extending beyond their ordinary import. (Beardley *v.* Tappan, 1 Blatch. C. C. 588.) And to the like effect, see Dorsey *v.* Whipps, 8 Gill, 457; Nichols *v.* Packard, 16 Verm. 83; Patterson *v.* Edwards, 2 Gilman, 720; Andrews *v.* Woodmansee, 15 Wend. 232; Taylor *v.* Kneeland, 1 Douglass, 67; Gosling *v.* Morgan, 32 Penn. St. R. 273; The State *v.* Henderson, 1 Richardson, 179; Caverley *v.* Caverley 3 Up. Can. Rep. 338, O. S.; Van Vechten *v.* Hopkins, 5 Johns. 211; Caldwell *v.* Abbey, Hardin, 529; McCuen *v.* Ludlam, 2 Harr. 12; Beswick *v.* Chappel, 8 B. Mon. 486; Benaway *v.* Coyne, 3 Chand. (Wis.), 214; Vaughan *v.* Havens, 8 Johns. 109; Gompertz *v.* Levy, 1 Perr. & Dav. 214; Dodge *v.* Lacey, 2 Carter (Ind.), 212; Cramer *v.* Noonan, 4 Wis. 231; Stevens *v.* Handley, Wright (Ohio.), 123. Where the charge was that plaintiff was a "bunter," without any innuendo to explain the meaning of that term, the court on the trial refused to receive evidence of the meaning and plaintiff was nonsuited. (Rawlings *v.* Norbury, 1 Fost. & F. 341.) See *ante* note 2 p. 169.

[2] Rex *v.* Horne, 2 Cowper, 688; approved Reg. *v.* Virrier, 4 Per. & D. 161.

[3] 1 Stark. Sland. 418; Rex *v.* Greepe, 2 Salk. 513; 1 L'd Raym. 256; 12 Mod. 139; 1 Saund. 243; Van Vechten *v.* Hopkins, 5 Johns. 220; McClaughry *v.* Wetmore, 6 Johns. 83; Thomas *v.* Croswell, 7 Johns. 271; Weed *v.* Bibbins, 32 Barb. 315.

[4] Barham *v.* Nethersole, Yelv. 21.

sumption of the innuendo."[1] The business of an innuendo is by a reference to preceding matter to fix more precisely the meaning.[2] The office of an innuendo is to explain not to extend what has gone before, and it cannot enlarge the meaning of words, unless it be connected with some matter of fact expressly averred."[3] The innuendo "is only a link to attach together facts already known to the court."[4]

§ 336. An innuendo cannot perform the office of a colloquium;[5] in other words, the want of a colloquium cannot be supplied by an innuendo.[6] The absence of a *col-*

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[1] Castleman *v.* Hobbs, Cro. Eliz. 428.

[2] Rex *v.* Aylett, 1 T. R. 63; Beardsley *v.* Tappan, 1 Blatch. C. C. 588; see *ante*, § 309.

[3] Patterson *v.* Edwards, 2 Gilman, 720; Van Vechten *v.* Hopkins, 5 Johns. 211. The innuendo cannot introduce new matter. (Taft *v.* Howard, 1 Chip. 275; Nichols *v.* Packard, 16 Verm. 83; Weir *v.* Hoss, 6 Ala. 881,) Or change the ordinary meaning of language. (Hays *v.* Mitchell, 7 Blackf. 117.

[4] Cooke on Defamation, 94.

[5] Fitzsimmons *v.* Cutter, 1 Aik. 33; The State *v.* Henderson, 1 Richardson, 179; Lindsey *v.* Smith, 7 Johns. 359; Ward *v.* Colyhan, 30 Ind. 396; The State *v.* Atkins, 42 Verm. 352; Stitzell *v.* Reynolds, 59 Penns. 488; Emery *v.* Prescott, 54 Maine, 389; Patterson *v.* Wilkinson, 55 Maine, 42; Beardsley *v.* Tappan, 1 Blatch. C. C. 588.

[6] Church *v.* Bridgman, 6 Mis. 190; Milligan *v.* Thorn, 6 Wend. 412; Sayre *v.* Jewett, 12 Wend. 135; Hawkes *v.* Hawkey, 8 East, 427; Joralemon *v.* Pomeroy, 2 New Jersey, 271. The words, "Thereby accusing the plaintiff of stealing," in a declaration, immediately following words alleged to have been spoken, which do not of themselves amount to a charge of larceny, without any precise *colloquium* or averment showing such to have been the intention, are not sufficient to make the declaration good. (Brown *v.* Brown, 2 Shep. 317.) Where, in an action for slander, the declaration alleged that the defendant had said of the plaintiff that he had set fire to his own premises, innuendo that plaintiff had been guilty of wilfully setting fire to the premises which, whilst in his occupation, had been destroyed by fire, it was held, on motion in arrest of judgment, that the court could not after verdict presume that the jury had found that defendant meant to impute to plaintiff that he had done it unlawfully or feloniously, as well as wilfully. (Sweetapple *v.* Jesse, 2 Nev. & M. 36; 5 B. & Adol. 27.) In slander, the declaration stated that the plaintiff was a justice of the peace, and that the defendant, meaning to injure and expose him to prosecution for corruption, &c., in a certain discourse, &c., said of the plaintiff, in his office of justice: "L. (meaning the plaintiff) had been feed by A. W. (meaning A. W., who lately had a cause pending and determined before the plaintiff), and that he (the defendant meaning) could do nothing when the magistrate was in that way against him (the de-

loquium, showing by extrinsic matter that the words charged are actionable, is not supplied by an innuendo attributing to those words a meaning which renders them actionable.[1] Words not in themselves actionable, cannot be rendered so by an innuendo, without a prefatory averment of extrinsic facts, which makes them slanderous.[2] If the words charged do not imply a criminal charge, subject to infamous punishment, an innuendo will not help them; but when they are used in a double sense, the plaintiff may, by an innuendo, aver the meaning with which he desires it to be understood they were spoken, and the jury may find whether they were spoken with that meaning or not.[3] Thus, where the charge was that the plaintiff lived by swindling and robbing the public, here the language might mean either fraud or felony. The plaintiff, in his declaration, alleged that it meant to charge him with being guilty of felony and robbery. On the trial it was held to

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fendant meaning). After verdict, the declaration was held sufficient. (Burtch *v.* Nickerson, 17 Johns. 217.) Where the words in themselves were such as were usually applied to the keeper of a gambling house, and obviously imputed to the plaintiff fraudulent and dishonorable conduct; held, that the declaration might be supported, although the words might not be capable, by innuendo, of being referred to any particular malpractice. (Digby *v.* Thomson, 1 Nev. & M. 485.) An averment in a declaration that the defendant had spoken of and concerning the plaintiff these words: "N. (meaning the plaintiff) burnt it (meaning the store), and he (meaning the plaintiff) knew it, and I (meaning the defendant) can prove it," preceded by a *colloquium* that the words were spoken of and concerning the burning of a store owned by the defendant, and followed by an averment that the words were intended to charge the plaintiff with a felonious burning, &c., was held sufficient. (Nichols *v.* Packard, 16 Verm. 83.)

[1] Holton *v.* Muzzy, 30 Verm. (1 Shaw), 365.

[2] Watts *v.* Greenleaf, 2 Dev. 115. See Brown *v.* Brown, 2 Shep. 317; Harris *v.* Burley, 8 N. Hamp. 256; Beswick *v.* Chappel, 8 B. Monr. 486; Dottarer *v.* Bushey, 16 Penns. 204; Lukehart *v.* Byerly, 53 Penns. 418; Moseley *v.* Moss, 6 Gratt. 534; Watson *v.* Hampton, 2 Bibb, 319; Hale *v.* Blandy, 1 You. & Jar. 480. A declaration containing words which, in common understanding, would import the crime against nature, preceding them with an averment that they were intended to charge the plaintiff with that crime, and following them with an averment that they were so understood, is good. (Goodrich *v.* Woolcot, 3 Cow. 231; affirmed, 5 Cow. 714.)

[3] Dottarer *v.* Bushey, 16 Penn. St. Rep. (4 Harris), 204.

impute only a charge of fraud, and as a charge of fraud is not actionable *per se* the plaintiff failed in his action.[1]

§ 337. An innuendo cannot *extend* the meaning of defamatory matter, unless by reference to matter of inducement. The innuendo must be supported by the inducement.[2] Where there was no inducement, and the allegation was, "T. Barham (the plaintiff) hath burnt my barn" (meaning my barn at that time full of corn); after verdict for the plaintiff judgment was arrested, because to burn the barn was only a trespass, and the innuendo meaning a barn full of corn, extended the signification of the word *burn*, and was unwarranted.[3] It should have been averred that the plaintiff had a barn full of corn, and that in a conversation about that barn, the defendant had spoken the words charged; then the innuendo that barn meant "my barn full of corn," would have been good. In libel, an innuendo imputing to the plaintiff larceny of plants and flowers of the defendant, and motion in arrest of judgment, on the ground that larceny could not be committed of flowers, and so the innuendo was too large; it was held sufficient after verdict, as the term *flowers* must be taken to have meant such flowers as were capable of being the subject of larceny, by being detached, or otherwise.[4] And

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[1] Smith *v.* Carey, 3 Camp. 461. See post, § 338.

[2] Taylor *v.* Kneeland, 1 Doug. 67; The State *v.* Henderson, 1 Rich. 179; Stucker *v.* Davis, 8 Blackf. 414. A judgment in slander will not be arrested because an innuendo enlarges the natural meaning of the words spoken. (Shultz *v.* Chambers, 8 Watts, 300; Solomon *v.* Lawson, 8 Q. B. 823.) But if rejecting the innuendo as surplusage, the words are not actionable *per se*, judgment must be arrested. (Barham *v.* Nethersole, Yelv. 21; Gainsford *v.* Blatchford, 7 Price, 544; 6 Price, 36.)

[3] Barham *v.* Nethersole, Yelv. 21. I saw Peter (plaintiff) with or at a heifer; innuendo committing sodomy; after verdict for plaintiff, judgment arrested, because innuendo not warranted. (Johnson *v.* Hedges, 6 Up. Can. Q. B. Rep. 337.) He (plaintiff) sheared two of Zack Austin's sheep and kept the wool, with an innuendo but no colloquium, held not sufficient to show a cause of action. (Brown *v.* Piner, 6 Ky. (Bush) 518.)

[4] Gardiner *v.* Williams, 2 Cr. M. & R. 78; 3 Dowl. Pra. Cas. 796. In this case, one of the counts set forth the following passage of a letter from the defendant to one P.: "I have reason to suppose that many of the flowers of which I have been robbed

where the language of the plaintiff, as clerk of a company, was, "You have done many things with the company for which you ought to be hanged, and I will have you hanged before," &c.; and there was an *innuendo* that the plaintiff had been guilty of felonies punishable by law with death by hanging, on motion in arrest of judgment, it was held sufficient.[1] The word forsworn cannot by an innuendo alone be interpreted perjury. Thus where the allegation was, "John Holt (meaning the plaintiff) hath forsworn himself (meaning that the plaintiff had committed wilful and corrupt perjury); after verdict for the plaintiff judgment was arrested, because the innuendo was unwarranted by any inducement.[2] In slander, the plaintiff averred that he had in due manner put in his answer on oath to a bill filed against him by the defendant in the Court of Exchequer, but did not proceed to aver any colloquium respecting that answer, with reference to which the words were spoken; and then alleged that the defendant said of him that he was forsworn, innuendo that the plaintiff had perjured himself in what he had sworn, in his aforesaid answer to the said bill; held, that this innuendo could not, without the aid of such a colloquium, enlarge the sense of the words by referring them to the answer averred in the prefatory part of the declaration to have been put in.[3] Where the declaration only alleged the intention to impute misconduct, and that the defendant maliciously published a notice, "That any person giving information where

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are growing upon your premises" (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had unlawfully disposed of them to P., and unlawfully placed them in P.'s garden.) The previous part of the letter stated that the plaintiff, whom P. had taken into his employ as a gardener, had been in the defendant's employ in the same capacity, and had been discharged for dishonesty; held, on error, that the innuendo was not too large. (1 M. & W. 245.)

[1] Francis *v.* Roose, 3 M. & W. 191.

[2] Holt *v.* Scholefield, 6 Term R. 691.

[3] Hawkes *v.* Hawkey, 8 East, 427.

property belonging to the plaintiff, a prisoner in the King's Bench prison, might be found, should receive five per cent. on the goods recovered," an innuendo that thereby the plaintiff had been guilty of concealing his property, with a fraudulent and unlawful intention, was held bad, on demurrer, as enlarging the meaning of the terms used.[1] In an action for a libel, the first count, after the usual prefatory averments, proceeded thus: "What possessed Lord H. (meaning thereby the said Lord Lieutenant of Ireland), if he knew anything about the country, or was not under the spell of vile and treacherous influence, to make his first visit, and that carefully puffed, to Long's, the coachmaker (meaning thereby the said plaintiff), the other day? If mere trade was his (meaning thereby the said Lord Lieutenant's) object, he had several respectable houses open to him" (meaning thereby that the house and place of business of the said plaintiff were not respectable, and that the said visit was paid thereto for political objects). *Held*, that the innuendo did not enlarge the sense of these words, which were fully capable of the meaning given to them.[2] And where the declaration stated that the plaintiff was a trader, and employed by the board of ordnance to relay the entrance to their office with new asphalte, and that the defendant falsely said of him in his said trade, and in reference to the work: "The old materials have been relaid by you in the asphalte work executed in front of the ordnance office, and I have seen the work done." Innuendo that the plaintiff had been guilty of dishonesty in the conduct of his said trade, by laying down again the old asphalte which had been before used at the entrance of the ordnance office, instead of new asphalte, according

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[1] Gompertz *v.* Levy, 1 Perr. & Dav. 214.

[2] Barrett *v.* Long, 3 Ho. of Lords Cas. 395. Where the declaration alleged that plaintiffs, A. and B., were husband and wife, and that defendant alleged that the female plaintiff was the wife of one C., innuendo that B. had been guilty of bigamy, held that the innuendo was warranted. (Heming *v.* Power, 10 M. & W. 564.)

to his contract. *Held*, on motion to arrest the judgment, that the declaration was sufficient, and the innuendo was not too large, as it put no new sense on the words, but only imputed intention to the speaker.[1] Where the words set forth were, that A was murdered, and the plaintiff was concerned in it and had a hand in it, innuendo meaning that the plaintiff aided and assisted in the commission of the murder, it was held to be sufficient.[2] The first count of a declaration charged the speaking these words of and concerning the plaintiff: "You are a bloody thundering thief, and all your family. I can prove you and them to be thieves. I can prove you (meaning plaintiff) to go down the river (meaning the river Thames) with ships of eight feet water (meaning ships drawing eight feet water), charging the owners for ten feet, &c.; and you (meaning plaintiff) are obliged to move from one parish to another" (meaning thereby that the plaintiff was guilty of dishonesty, and of charging more for the pilotage of certain ships than he was by law entitled to do). *Held*, that the words were actionable without any innuendo, but that those put were proper.[3] "I have heard that a maid of Sir J. K.'s should report, that he being sick and she looking through a hole of the door, saw a *priest* (innuendo *a popish priest*) give the eucharist and extreme unction;" * * * and "saw a popish priest *anoint* (innuendo *extreme unction*) him." *Held*, after verdict, that *priest* was rightly construed *popish priest*, and *anoint* was rightly construed extreme unction.[4] Where the words charged as libellous were, "Who was deprived of a two-penny justiceship, for malpractice in packing a jury," and they were explained, by an innuendo, as meaning "that the

[1] Baboneau *v.* Farrell, 15 C. B. 360; 24 Law J. Rep. (N. S.) C. P. 9; 1 Jur. N. S. 114.

[2] Tenney *v.* Clements, 10 N. Hamp. 52.

[3] Sempsey *v.* Levy, 2 Jurist, 776.

[4] Knightly *v.* Marrow, 3 Lev. 68.

plaintiff had packed a jury, and had been guilty of malpractice in packing a jury," it was held that the innuendo was warranted by the words charged.[1]

§ 338. Where language is ambiguous, and is as susceptible of a harmless, as of an injurious meaning, it is the function of an innuendo to point out *the meaning* which the plaintiff claims to be the true meaning, and the meaning upon which he relies to sustain his action. This applies whether the ambiguity be patent or latent (§ 128),[2] and whether or not there are any facts alleged as inducement.[3] By this means the defendant is informed of the precise charge he has to meet, and to deny or justify; but the plaintiff is subjected to the risk that if he claims for the language a meaning which is not the true one, or one which he is unable to make out satisfactorily, he may be defeated on the ground of *variance* or *failure of proof*. For when the plaintiff, by his innuendo, puts a meaning on the language published, he is bound by it, although that course may destroy his right to maintain the action; as where the alleged slander was that "Mrs. B.'s time has come around (innuendo that the usual period of parturition had arrived), and he (plaintiff) is down there getting a child away from her. He is procuring an abortion upon her." It was held that but for the interpretation the plaintiff had, by the innuendo, put on the

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[1] Mix *v.* Woodward, 12 Conn. 262. In an action for slander, the innuendoes "meaning to insinuate and falsely represent," "meaning to insinuate and be understood," or "meaning and intending to represent," "that the plaintiff had stolen the money aforesaid," indicate that the defendant's charge against the plaintiff was that he had stolen the money, and therefore were sufficient. (Hoyt *v.* Smith, 32 Vt. (3 Shaw), 304.)

[2] Griffith *v.* Lewis, 8 Q. B. 841; 7 Adol. & El. N. S. 67; Joralemon *v.* Pomeroy, 2 New Jer. 271; Watson *v.* Nicholas, 6 Humph. 174. But "it is not allowable to interpret what has no need of interpretation." (McCluskey *v.* Cromwell, 11 N. Y. 601; and *ante*, note p. 161.)

[3] Clegg *v.* Laffer, 3 Moo. & Sc. 727; 10 Bing. 350; Williams *v.* Stott, 1 C. & M. 675; Smith *v.* Carey, 3 Camp. 461.

words "her time has come around," the words were actionable, but with that meaning they were not actionable, and plaintiff was bound by the interpretation he had himself supplied.[1] And so where the plaintiff alleged that he was treasurer and collector of certain tolls, and that defendant published of him (plaintiff), as such treasurer and collector, "You are gathering the toll for your own pocket," innuendo that plaintiff, being such treasurer and collector, was guilty of collecting tolls to improperly apply them to his own use; on the trial, the plaintiff having proved that he was treasurer only, and not collector, the variance was considered fatal, and the plaintiff was nonsuited; for the words were applicable to the plaintiff rather in his character of collector than treasurer, and the plaintiff was bound to prove the words applicable to the plaintiff in the manner which he himself had pointed out by innuendo.[2]

§ 339. If the innuendo consists of two distinct allegations, which can be separated without destroying the sense of either of them, and one of them is and the other is not warranted by the alleged libellous matter, the latter may be rejected, and the count will be valid.[3] Therefore, in an action of slander, where the words alleged to have been spoken clearly charged the killing of a horse, and the innuendo was that the defendant intended to charge the plaintiff with arson, it was held that the innuendo might be stricken out, and the declaration sustained upon the charge of killing the horse.[4]

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[1] Butler *v.* Wood, 10 How. Pra. R. 222. When, at the close of the trial, the plaintiff claimed and obtained a verdict upon a meaning different from that pointed by his innuendo, a new trial was granted, on the ground of surprise upon the defendant. (Hunter *v.* Sharp, 4 Fost. & F. 983.) (See Gompertz *v.* Levy, 9 A. & E. 282; and Smith *v.* Carey, 3 Camp. 461, *an'e*, § 336.

[2] Sellars *v.* Tell, 3 B. & C. 655; see *ante*, note 6, p. 512.

[3] Barrett *v.* Long, 8 Irish Law Rep. 331.

[4] Gage *v.* Shelton, 3 Rich. 242.

§ 340. The following innuendoes were held to be proper, without any inducement to support them: Bishops, innuendo Bishops of England;[1] Ministers, innuendo the Ministers of the King of England;[2] The Navy, innuendo the Royal Navy of this kingdom;[3] Chevalier, innuendo the Pretender;[4] Little Gentleman on the other side of the water, innuendo the Prince of Wales;[5] Door, innuendo The Outer Door;[6] Death, innuendo Murder;[7] His, innuendo the defendant;[8] mere man of straw, innuendo he was insolvent.[9] M. G. (the plaintiff's son and servant) uses two balls to his mother's steelyard, innuendo that plaintiff, by M. G. as her servant, used fraudulent weights, and cheated in her trade.[10]

§ 341. The following innuendoes were held to be unwarranted, there being no inducement to support them: Thomaston, innuendo the State Prison situate in the town of Thomaston;[11] He fired his house, innuendo he voluntarily fired his house;[12] She is sick, innuendo she has had a child;[13] Tan-money, innuendo money the produce of the sale of Tan;[14] She is a bad girl, innuendo a prostitute;[15] Public house, innuendo a bawdy house;[16]

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[1] Baxter's Case, 3 Mod. 69.

[2] Anon. 11 Mod. 99.

[3] Tutchin's Case, 5 State Trials, 590.

[4] Rex *v.* Matthews, 9 State Trials, 682.

[5] Anon. 11 Mod. 99.

[6] Rex *v.* Aylett, 1 T. R. 63.

[7] Oldham *v.* Peake, 2 W. Black. 959.

[8] Muck's Case, 8 Mod. 30. Filly horse, innuendo the plaintiff's wife, his name being Hoss. (Weir *v.* Hoss, 6 Ala. 881; and see *ante*, note p. 163.)

[9] Eaton *v.* Johns, 1 Dowl. Pra. Cas. N. S. 602.

[10] Griffiths *v.* Lewis, 7 Law Times, 177; 8 Q. B. 841.

[11] Emery *v.* Prescott, 54 Maine, 389.

[12] Anon. 11 Mod. 220.

[13] Smith *v.* Gafford, 33 Ala. 108,

[14] Day *v.* Robinson, 1 Ad. & Ell. 554.

[15] Snell *v.* Snow, 13 Metc. 278.

[16] Dodge *v.* Lacey, 2 Cart. 212; *ante*, note 3, p. 188.

Thou hast stolen half an acre of my corn, innuendo the corn growing upon half an acre of ground reaped and put into shocks by the defendant;[1] You are a regular prover under bankruptcies, innuendo that plaintiff was accustomed to prove fictitious debts under commissions of bankruptcy;[2] He had corn from B.'s barn, innuendo that he had stolen corn from B.;[3] My landlord, innuendo the plaintiff;[4] Your father, innuendo the plaintiff;[5] Thy son, innuendo the plaintiff;[6] He lost no time in transferring himself, together with £—— of John Bull's money, to Paris, where he now out-tops princes in his style of living, innuendo that the plaintiff had thereby *cheated* John Bull.[7]

§ 342. Evidence cannot be introduced to support or explain an innuendo.[8] "I never knew an innuendo offered to be proved."[9] Its truth must always appear from precedent averments.[10] An issue cannot be raised upon the truth of an innuendo.[11] Where an averment or colloquium introduces extrinsic matter into a complaint,

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[1] Castleman *v.* Hobbs, Cro. Eliz. 428.

[2] Alexander *v.* Angle, 1 Tyrw. 9; 1 C. & J. 143; 7 Bing. 119. 4 M. & P. 870.

[3] Wheeler *v.* Haines, 1 Perr. & Dav. 55; 9 Adol. & Ell. 286 *n*; Harvey *v.* French, 2 Moo. & S. 591.

[4] Cro. Car. 40; 1 Stark. Sland. 386.

[5] Golds. 187; Cro. Eliz. 416, 439; Cro. Car. 92, 173; Mo. 365.

[6] Shalmer *v.* Foster, Cro. Car. 177; but see Wiseman *v.* Wiseman, Cro. Jac. 107, where it was alleged the defendant spoke the words *de prœfato querente existente fratre suo naturali*, and adjudged for plaintiff. Where the description may apply to one of a class, as brothers or sons, it is unnecessary for the plaintiff to aver that he is the only brother or only son. (1 Stark. Sland. 388.) See *ante*, note 1, p. 517.)

[7] Yrisarri *v.* Clements, 3 Bing. 432.

[8] The State *v.* Henderson, 1 Richardson, 179; Van Vechten *v.* Hopkins, 5 Johns. 211; Gidney *v.* Blake, 11 Johns. 54; see Johnston *v.* McDonald, 2 Up. Can. Q. B. Rep. 209.

[9] Pollexfen arg. Rosewell's Case, 3 State Trials, 1058, admitted by court and opposite counsel, cited and approved Van Vechten *v.* Hopkins, 5 Johns. 226.

[10] Taylor *v.* Kneeland, 1 Douglass, 67.

[11] Fry *v.* Bennett, 5 Sandf. 54; Commonwealth *v.* Snelling, 15 Pick. 335. Justifying an innuendo, see Biggs *v.* Gt. East. R. R., 16 Weekly Rep. 908.

that is proper subject of proof.[1] Whether the language is *capable* of bearing the meaning assigned by the innuendo, is for the court; whether the meaning is *truly* assigned to the language, is for the jury.[2]

§ 343. Where the language is not in itself applicable to the plaintiff, no innuendo can make it so.[3] But where the matter published on its face appears to apply to a class of individuals, the plaintiff may, by an innuendo, show that the publication applied to him; that, is not extending the sense of the matter. Therefore, where the declaration alleged that the plaintiff was owner of a factory in Ireland, and charged that the defendant published of him and of the said factory a libel, imputing that, "in some of the Irish factories" (meaning thereby the plaintiff's) "cruelties were practised," though there was no allegation otherwise connecting the libel with the plaintiff, was, after verdict, held good.[4] If the plaintiff is designated by another name in the libel, his real name may be designated by inducement and an *innuendo*.[5] In

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[1] Van Vechten *v.* Hopkins, 5 Johns. 24.

[2] Blagg *v.* Sturt, 10 Q. B. 899; Broome *v.* Gosden, 1 C. B. 728; Barrett *v.* Long, 3 Ho. of Lords Cas. 395; Babonneau *v.* Farrell, 15 C. B. 360; Hemmings *v.* Gason, 5 Irish Law Rep. 498.

[3] See in note to § 131 *ante*.

[4] Le Fanu *v.* Malcomson, 1 House of Lords Cas. 637; 13 Law Times, 61; Parker *v.* Raymond, 3 Abb. Pra. Rep N. S. 343; Marsden *v.* Henderson, 22 Up. Can Q. B. Rep. 585. There needs no innuendo when the words are spoken to the plaintiff himself. (2 Rolle Rep. 243.) "You have bewitched my mare," innuendo the mare of the *plaintiff* instead of the *defendant*, held good after verdict. (Smith *v.* Cooker, Cro. Car. 512), but see *ante*, note 5, p. 516.

[5] Hays *v.* Brierly, 4 Watts, 392. "Mr. Deceiver" (meaning the plaintiff), held good on writ of error. (Fleetwood *v.* Curle, Cro. Jac. 557.) The following was held sufficient to point out the plaintiff: "This diabolical character, like Polyphemus, the man-eater, has but one eye, and is well known to all persons acquainted with the name of a certain circumnavigator," meaning to allude to the plaintiff's name. (J'Anson *v.* Stuart, 1 T. R. 748.) A declaration in slander, which, averring a colloquium concerning the plaintiff and A., charged the defendant with saying that A. thinks it a hard matter to commit fornication with "his niece" (meaning the plaintiff), was held sufficient, without an averment that the plaintiff was A.'s niece. (Miller *v.* Parish, 8 Pick. 384.)

libel the plaintiff averred that she was the mother of one Edward J. Barker, and that defendant, knowing this, to defame her, published "of the Barkers—that was the name of his reputed father, what was his mother's I either never knew or have forgot, but I know it was not Barker," innuendo that plaintiff was the mother of an illegitimate child, on demurrer held that the declaration was good.[1] A count in libel, after averring that a sum of money was standing in the Bank of England, at the time of the death of one W. T., in his name, alleged that the defendant published concerning the plaintiff, and concerning such money, the following libel: "There is strong reason for believing that a considerable sum of money was transferred from Mr. T.'s (meaning the said W. T.'s) name in the books of the Bank of England, by power of attorney obtained from him by undue influence, after he became mentally incompetent to perform any act requiring reason and understanding" (thereby meaning that the plaintiff had transferred, or caused to be transferred, the said money from the said W. T.'s name in the said books of the said bank, by means of a power of attorney obtained by him from the said W. T., by undue influence exercised by him over the said W. T., at a time when the said W. T. had become mentally incompetent to give a power of attorney, and to perform any act requiring reason and understanding). Held, after verdict for plaintiff, on motion in arrest of judgment, that the libel was sufficiently shown to point to the plaintiff.[2] Averments were introduced into the declaration, of words spoken by the defendant imputing dishonesty to L., the name of L. being followed by the innuendo, "meaning the plaintiffs' agent and clerk," but there was nothing else in the declaration showing any connection between L. and the

[1] Anderson *v.* Stewart, 8 Up. Can. Q. B. Rep. 243; and see *ante*, note 6, p. 537.

[2] Turner *v.* Merrywether, 13 Jur. 683; 18 Law Jour. C. P. 155; 12 Law Times, 474.

plaintiffs. Held, that in the absence of a direct averment connecting L. with the plaintiffs or their business, the words alleged to have been spoken concerning them were not actionable in favor of the plaintiffs.[1] Where the alleged libel consisted of a passage in a newspaper warning certain persons to avoid the traps laid for them by desperate adventurers, innuendo the plaintiff amongst others, was *after verdict* held sufficiently to point out the plaintiff.[2] Where there was no colloquium that the defamatory matter was concerning the justices of Suffolk, and it did not appear on the face of the alleged libel that it applied to such justices, it was held that the defamatory matter could not be connected with or applied to such justices by means of an innuendo.[3]

§ 344. If a complaint is sufficient without the innuendo, the innuendo may be rejected as surplusage;[4] the innuendo may always be rejected when it merely introduces matter not necessary to support the action,[5] or when it is incongruous,[6] or too broad;[7] an innuendo that the attorney-general spoken of meant the attorney-general for the County Palatine of Chester was so rejected.[8]

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[1] Smith *v.* Hollister, 32 Verm. (3 Shaw), 695.

[2] Wakley *v.* Healey, 18 Law Jour. 241, C. P.

[3] Rex *v.* Alderton, Sayre, 280; and, to the like effect, Hawkes *v.* Hawkey, 8 East, 427; Savage *v.* Robery, Cowper, 680.

[4] Commonwealth *v.* Snelling, 15 Pick. 335; Moseley *v.* Moss, 6 Gratton, 534; Cooper *v.* Greeley, 1 Denio, 360; Harvey *v.* French, 1 Cr. & M. 1, affirmed 2 Mo. & Sc. 591; Gage *v.* Shelton, 2 Rich. 242; Giles *v.* The State, 6 Geo. 276.

[5] Thomas *v.* Crosswell, 7 Johns. 264; Crosswell *v.* Weed, 25 Wend. 621; Carter *v.* Andrews, 16 Pick. 1; Carroll *v.* White, 33 Barb. 621; Hudson *v.* Garner, 22 Miss. (1 Jones) 423; Rodebaugh *v.* Hollingsworth, 6 Ind. 339.

[6] Gardiner *v.* Williams, 2 Cr. M. & R. 78; 3 Dowl. Pra. Cas. 796.

[7] Benaway *v.* Coyne, 3 Chand. (Wis.) 214; Barrett *v.* Long, 3 Ho. of Lords Cas. 395.

[8] Roberts *v.* Camden, 9 East, 93; and see Day *v.* Robinson, 4 Nev. & M. 841; West *v.* Smith, 4 Dowl. 703. Where the language is actionable *per se*, special damages, although alleged, need not be proved. (Cook *v.* Field, 3 Esp. Cas. 133; Kelly *v.* Huffington, 3 Cr. C. C. 81.)

§ 345. Special damages or those damages which are not the necessary consequence of the language complained of [§§ 197 to 202], must be specially alleged in the complaint, or the plaintiff will not be allowed on the trial to go into evidence to prove such damages.[1] Where the language is actionable *per se*, special damage need not be alleged;[2] but if the language is not actionable *per se*, special damage must be alleged. Allegations of special damages are not traversable. They are inserted in the complaint to apprise the defendant of what he must be prepared to rebut on the trial.[3] Where the declaration set forth that the plaintiff was a ship-master, the words defaming him as such, and that, by reason of the same, "certain insurance companies in the city of New York refused to insure any vessel commanded by him, or any goods laden on board any vessel by him commanded;" *Held*, that the allegation was too general, and that proof could not be given under it of the refusal of a particular company to insure the plaintiff's vessel.[4] Where the allegation was, that certain persons, naming them, who would otherwise have employed plaintiff, refused so to do; *Held*, that the allegation was not supported by evidence that certain other persons would have recommended plain-

[1] Squier *v.* Gould, 14 Wend. 159; Strang *v.* Whitehead, 12 *Id.* 64; Roberts *v.* Roberts, 5 B. & S. 385; Kelly *v.* Huffington, 3 Cr. C. C. 81; Birch *v.* Benton, 26 Miss. (5 Jones) 155; Johnson *v.* Robertson, 8 Porter, 486; Barnes *v.* Trundy, 31 Maine, (1 Red.) 321; Bostwick *v.* Nicholson, Kirby, 65; Bostwick *v.* Hawley, *Ib.* 290; Shipman *v.* Burrows, 1 Hall, 399; Harcourt *v.* Harrison, *Ib.* 474; Geare *v.* Britton, Bull. N. P. 7; Wilson *v.* Runyon, Wright, 651. Nor to give evidence of a general loss of reputation. (Herrick *v.* Lapham, 10 Johns. 281.) A complaint for words in writing charging insanity need not allege special damage. (Perkins *v.* Mitchell, 31 Barb. 461.) So in an action by one of several partners. (Robinson *v.* Marchant, 7 Q. B. 918.) In an action for defaming one in his trade no allegation of special damage is necessary. (Ingram *v.* Lawson, 6 Bing. N. C. 212; Foulger *v.* Newcomb, 36 Law Jour. Ex. 169; Butler *v.* Howes, 7 Cal. 87.) In such cases the occupation supplies the place of special damage; *ante*, p. 256 *n.*

[2] Hicks *v.* Walker, 2 Greene (Iowa), 440.

[3] Malony *v.* Dows, 15 How. Pra. R. 265.

[4] Shipman *v.* Burrows, 1 Hall, 399.

tiff to the persons named in the declaration, and that if the plaintiff had been so recommended, the persons named in the declaration would have employed him; the not employing being not on account of the slander, but of the non-recommendation.[1] In an action of slander imputing incontinence to the plaintiff, it was held enough to state, that the plaintiff was occasionally employed to preach to a dissenting congregation at a certain licensed chapel, from which he derived considerable profit, and that, by reason of the scandal, "persons frequenting the chapel had refused to permit him to preach there, and had discontinued the emoluments which they would otherwise have given him," without saying who those persons were, or by what authority they had excluded him, or that he was a preacher duly qualified according to statute (10 Anne, c. 2);[2] and in an action for slander for words spoken of the plaintiff in his trade or business, with a general allegation of loss of business, it is competent to the plaintiff to prove, and the jury to assess damages for a general loss or decrease of trade, although the declaration alleges the loss of particular customers as special damage, which is not proved.[3] As a general rule the customers should be named,[4] but this is not always necessary.[5] The omission

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[1] Strong *v.* Foreman, 2 C. & P. 592.

[2] Hartley *v.* Herring, 8 T. R. 130.

[3] Evans *v.* Harries, 1 Hurl. & Nor. 251; and per Martin B., "How is a public-house keeper, whose only customers are passers-by, to show a damage resulting from the slander, unless he is allowed to give general evidence of a loss of custom," (*id.*); and see Rose *v.* Groves, 5 M. & G. 613. The plaintiff may aver a general diminution of business, or particular instances of damage; in the latter case the names of the customers lost should be given. (Hamilton *v.* Walters, 4 Up. Can. Rep. 24, O. S.)

[4] Mayne on Damages, 278, 317; Feise *v.* Linder, 3 B. & P. 372; Browning *v.* Newman, 1 Str. 666; Westwood *v.* Cowne, 1 Stark. 172; and see 8 T. R. 130; 1 Wms. Saund. 243. In New York it was held that a general averment of loss of customers is not a sufficient allegation of special damages, and that no proof of loss of customers can be given under such an allegation. (Tobias *v.* Harland, 4 Wend. 537; and see Halleck *v.* Miller, 2 Barb. 630.) The loss of a customer is special damage, although if the dealing had taken place the plaintiff would have lost by it. (Storey *v.* Challands, 8 C. & P. 234.)

[5] Trenton Ins. Co. *v.* Perrine, 3 Zab. 402.

of the names of the customers lost, amounts only to a want of definiteness, and in New York is to be taken advantage of by a motion to make definite and certain, not by demurrer.[1] Where the supposed special damage consists in loss of marriage, the name of the individual with whom the marriage was contemplated should be stated.[2]

§ 346. Where loss of certain customers, naming them, is alleged, the best evidence in support of such allegation is the testimony of the persons named;[3] and so where it is alleged that certain persons, naming them, refused to employ the plaintiff, the best evidence of such refusal is the testimony of the persons named.[4] In an action for words not actionable *per se*, the declaration alleged for special damage, that, in consequence of the speaking of the words, four of plaintiff's customers ceased to deal with him. Three of those persons proved only that they ceased to deal with plaintiff in consequence of reports they had heard in the neighborhood; but the fourth proved the speaking by the defendant of words substantially as charged, and stated that he did not deal with plaintiff afterwards. *Held*, some evidence of special damage.[5]

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[1] Hewitt *v.* Mason, 24 How. Pra. R. 366; and by 15 and 16 Vict. ch. 76, abolishing special demurrers, the right to demur for want of certainty is abolished and a motion to make definite substituted. It has been said that greater certainty is required where the special damage is the gist of the action, than when it is merely laid by way of aggravation. (Wetherell *v.* Clerkson, 12 Mod. 597; Clarke *v.* Periam, 2 Atk. 33.) An allegation of special damage must be specific. (Cook *v.* Cook, 100 Mass. 194.)

[2] 1 Sid. 396; 1 Vent. 4; Cro. Jac. 499; 12 Mod. 597; and loss of marriage with any other than the one mentioned cannot be proved (L'd. Raym. 1007) as to alleging special damage in action for slander of title. See *ante* note 5 p. 315, and Moore *v.* Meagher, 1 Taunt. 39.

[3] Tilk *v.* Parsons, 2 Car. & P. 201; Barnett *v.* Allen, 1 Fost. & F. 126; King *v.* Watts, 8 C. & P. 614.

[4] Johnson *v.* Robertson, 8 Porter, 486.

[5] Bateman *v.* Lyall, 7 C. B. (N. S.) 638. In King *v.* Townsend, 2 Law Reporter, 126 (appendix, post.) the special damage laid was that A. B. had by reason of the libel *wholly* ceased to deal with the plaintiff, the proof was that A. B. had not by reason of the libel dealt with the plaintiff to so great an extent as theretofore, held that this was sufficient evidence of special damage to sustain the declaration.

§ 347. A plaintiff may unite in one complaint, a cause of action for slander with a cause of action for libel, or for malicious prosecution,[1] or slander of title.[2] Assault and battery cannot be united with slander or libel.[3] A cause of action in a plaintiff singly for slander of him in his partnership business, cannot be joined with a cause of action in him and his partners jointly.[4] Several sets of words, imputing the same charge, and laid as of the same time, may be included in one count.[5] You may put into one count all the words published at one time, but not words published at different times.[6] A complaint which sets out an entire conversation in which the slander was spoken, contains only one cause of action although the conversation consists of several parts, each of which is actionable.[7] The second count of a declaration in slander charged that in another discourse of and concerning plaintiff, &c., the defendant spoke these words: "You, Mrs. G. (the plaintiff), have used them for years," (innuendo that plaintiff had used fraudulent weights, and cheated in her trade); and also in the last-mentioned discourse, in answer to a question put by the plaintiff, as to whether the defendant had said to one J. G. that the plaintiff's son had used two balls to the

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[1] Martin *v.* Mattison, 8 Abb. Pra. Rep. 3; Shore *v.* Smith, 15 Ohio, 173; King *v.* Waring, 5 Esp, 13; Manning *v.* Fitzherbert, Cro. Car. 271; Hull *v.* Vreeland, 42 Barb. 543; Delegal *v.* Highley, 3 Bing. N. C. 950.

[2] Cousins *v.* Merrill, 16 Up. Can. C. P. Rep. 114. By statute in Ireland, in an action for slander or libel, counts may be added for false representation of plaintiff's goods. (McNally *v.* Oldham, 8 Law Times, N. S. 604.)

[3] Anderson *v.* Hill, 53 Barb. 238, overruling Brewer *v.* Temple, 15 How. Pra. Rep. 286.

[4] Robinson *v.* Marchant, 7 Q. B. 918.

[5] Rathbun *v.* Emigh, 6 Wend. 407; Miligan *v.* Thorn, 6 Wend. 412; Dioyt *v.* Tanner, 20 Wend. 190; Churchill *v.* Kimball, 3 Ohio, (Ham.) 409; Hoyt *v.* Smith, 32 Verm. (3 Shaw) 304.

[6] Hughes *v.* Rees, 4 M. & W. 204. It is allowable to include in the same declaration divers distinct words of slander of different import. (Hall *v.* Nees, 27 Ill. 411.) It is sometimes a question whether a declaration consisted of one or more counts. See Cheatham *v.* Tillotson, 5 Johns. 430; Griffith *v.* Lewis, 8 Q. B. 841.

[7] Cracraft *v.* Cochran, 16 Iowa, 301.

plaintiff's steelyard, these other words: "to be sure I did," &c.; and also these other words, &c.; *Held*, that as there was but one continued discourse at the same time, this was but one count, although the words set out were divided into several sentences.[1] In New York, where the complaint contains several causes of action, each cause of action must be separately stated and numbered,[2] and be perfect in itself.[3]

§ 348. In New York a supplemental complaint is permitted. A plaintiff in an action for libel may be allowed to serve a supplemental complaint setting out matter material to the action, occurring after the commencement of the action. And in that case a supplemental complaint was allowed, setting up alleged special damage occasioned by the publication of the libel, and occurring after the service of the original complaint.[4]

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[1] Griffiths *v.* Lewis, 8 Q. B. 841; 7 Law Times, 177.

[2] Court Rules, 19; Pike *v.* Van Wormer, 5 How. Pra. Rep. 171.

[3] Holt *v.* Muzzy, 30 Verm. (1 Shaw) 365; Sinclair *v.* Fitch, 3 E. D. Smith, 689.

[4] Scott *v.* Hallock, MS. Gen. Term Superior Court New York, 19 Dec. 1857.

CHAPTER XIV.

PLEADING.—ANSWER.—DEMURRER.

The answer corresponds to plea—What it must contain—Plea to part of a count—Answer of justification must give color, show a lawful occasion, and deny malice—Several answers—Defense of truth must be pleaded—How pleaded—Where the charge is general—Where the charge is specific—Certainty in statement of facts—Answer of justification bad in part, bad altogether—Mitigating circumstances—Demurrer—Counter-claim.

§ 349. The *answer* corresponds to the *plea* in the common law system of pleading. In New York it is provided as to an answer, that it "must contain (1) a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; (2) a statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition." And with regard to an answer in the action for slander or libel, it is also provided "the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances."[1] Mate-

[1] Code of Pro., §§ 149, 165. An answer which merely states that the defendant did not utter the words alleged at the place and time alleged, may be good as a general denial. (Salenger *v.* Lusk, 7 How. Pra. Rep. 430.) As to a general denial in Maryland. (Hagan *v.* Hendry, 18 Md. 177.) A plea that the letter containing the defamatory matter was intended for the plaintiff himself, but by mistake was handed to his employer, was held bad. (Fox *v.* Broderick, 14 Irish Law Rep. 453.) In an

rial allegations in the complaint not controverted by the answer are "taken as true,"[1] and this applies to allegations of inducement.[2] Objections to the complaint not taken by answer or demurrer, are deemed waived except only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action.[3] The defendant is not compelled to verify his answer.[4]

§ 350. The general issue in an action for slander or libel was "not guilty;" and this had probably a larger effect than has a "general denial" under the New York Code, by which we intend that under the "general issue" matters of defense were admitted which would not be admitted under the "general denial." Under the New York system of pleading, every defense not consisting of a mere denial must be specially pleaded. Much relating to the subject of the plea or answer has been anticipated (§§ 211 to 216), and much more on the subject will be found under the head of Evidence. (§§ 403–406.)

§ 350*a*. As the inducement must be stated in a traversable form (§ 312), so a denial of a material matter of inducement constitutes a good defense, as where the declaration alleged, by way of inducement, that is was dis-

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action for libel the defendant at first pleaded not guilty, but afterwards pleaded, to the further maintenance of the action, that the plaintiff had recovered damages against another person for the same grievances. New assignment, that the present action was brought for other and different grievances. Plea to new assignment, not guilty. Held, that this did not admit the innuendoes, and that, by pleading not guilty to the new assignment, the defendant had raised precisely the same issue as if the libel had been set out in the declaration, and the defendant had pleaded not guilty to it. (Brunswick, Duke of, *v.* Pepper, 2 Car. & K. 683.)

[1] Code of Pro., § 168, and so in England, Heming *v.* Power, 10 M. & W. 567; Gwynne *v.* Sharpe, 1 Car. & Mar. 532.

[2] Fradley *v.* Fradley, 8 C. & P. 572.

[3] Code of Pro., § 148. Admissions in the answer cannot be retracted on the trial. (Whittemore *v.* Ware, 101 Mass. 353.)

[4] Laws of New York, 1854, p. 153; Scoville *v.* New, 12 How. Pra. Rep. 319; Blaisdell *v.* Raymond, 5 Abb. Pra. Rep. 144; 6 *Id.* 148.

graceful for a duly qualified physician of the allopathic school to meet one of the homeopathic school in consultation, and then alleged that defendant had published of plaintiff that he had met in consultation with a homeopathist, the plea denied that it was disgraceful for a duly qualified physician of the allopathic school to meet one of the homeopathic school in consultation, and it was held a good plea;[1] and so where the declaration alleged that the term black sheep was used in a defamatory sense, and that the defendant had applied that term to the plaintiff, a plea denying that black sheep was used in a defamatory sense was held good.[2]

§ 351. It was held in New York that a plea in bar must answer the whole count, but that one plea might state several defenses, *i. e.*, different defenses to different parts of one count or statement of a cause of action.[3] Perhaps the rule is, that, if the matter is divisible, although contained in one count, a defendant may plead to part of the matter of one count.[4] If the part of the charge not expressly covered by the plea does not amount to an actionable charge, then the plea is in effect to the whole count.[5] A plea to a part of a count, and that part not amounting to an actionable charge, is bad; as where the

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[1] Clay *v.* Roberts, 8 Law Times, N. S. 397.

[2] McGregor *v.* Gregory, 11 M. & W. 287.

[3] Cooper *v.* Greeley, 1 Denio, 365; and see Ames *v.* Hazard, 6 R. I. 335. That a plea may apply to part of libel, see Spencer *v.* Southwick, 11 Johns. 573.

[4] See Edwards *v.* Bell, 1 Bing. 403; Cooper *v.* Lawson, 1 Perr. & D. 15; O'Connell *v.* Mansfield, 9 Ir. Law Rep. 179; and see *ante*, note 2 p. 201, and Torrey *v.* Fields, 10 Verm. 353. Where the first count in a declaration for a libel, alleged that plaintiff, a proctor, had been three times suspended, and the second count alleged the having been suspended three times for extortion; the plea as to so much of the charge as imputed one suspension, justified it as being true, held on demurrer that the plea was good, and that it was sufficiently applicable to the charge in the first count, if not to that in the second. (Clarkson *v.* Lawson, 6 Bing. 587.)

[5] Barrows *v.* Carpenter, 1 Cliff. 204; Clarke *v.* Taylor, 3 Scott, 95; if the part not justified contains ambiguous statements, the court will not draw any libellous inference from them, if plaintiff has not done so in his declaration. (*Id.*)

charge was, "Mr. P. (plaintiff) told me he had given my child too much mercury, *and poisoned it*," and the justification was only of so much only as charged giving too much mercury.[1]

§ 352. An answer of justification must give color to the extent of admitting, for the purposes of the answer only, the publication complained of.[2] But this admission cannot be used to defeat a denial by a separate answer. Because "one plea cannot be taken to help or destroy another, but every plea must stand or fall by itself."[3] A plea of privileged publication must show a lawful occasion, and a denial of malice; a plea which only alleged that the defendant spoke the words on such occasion, firmly believing them to be true, was held bad for want of an express or implied denial of malice.[4]

§ 353. The defendant may, in one answer, set up a general denial, or not guilty, and a justification on the ground of truth.[5] But he cannot, with not guilty as to

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[1] Edsall *v.* Russell, 4 M. & Gr. 1090; 5 Sc. N. R. 801.

[2] Fidler *v.* Delavan, 20 Wend. 57; Wilson *v.* Beighler, 4 Iowa, 427; Vanderveer *v.* Sutphin, 5 Ohio, N. S. 293; Edsall *v.* Russell, 2 Dowl. N. S. 641; 5 Sc. N. S. 801; Davis *v.* Matthews, 2 Ham. 257; Folsom *v.* Brown, 5 Foster, (N. Hamp.) 114; Samuel *v.* Bond, Litt. Sel. Cas. 158; Buddington *v.* Davis, 6 How. Pra. R. 402; Porter *v.* McCreedy, 1 Code Rep. N. S. 88. A plea of justification held bad unless accompanied with a traverse of the publication in a manner to insult. (Crawford *v.* Milton, 12 S. & M. 328.) See Carlock *v.* Spencer, 2 Eng. 12.

[3] Grills *v.* Marwells, Willis, 380; Kirk *v.* Nowell, 1 T. R. 125; Montgomery *v.* Richardson, 5 C. & P. 247; and see cases collected, Voorhies' Code, 296 *c*, 8th edit.; *contra*, see Jackson *v.* Stetson, 15 Mass. 48; Alderman *v.* French, 1 Pick. 1; Cilley *v.* Jenness, 2 N. Hamp. 89; Whittaker *v.* Freeman, 1 Dev. 280; Wheeler *v.* Robb. 1 Blackf. 330; Wright *v.* Lindsay, 20 Ala. 428; Doss *v.* Jones, 5 Howard (Miss.), 158; Rev. Stat. of Mass. ch. 100, § 18; Hix *v.* Drury, 5 Pick. 260.

[4] Smith *v.* Thomas, 2 Bing. N. S. 372; 2 Sc. 543; 4 Dowl. Pra. Cas. 333. Except in defenses of privileged publication, the denial of malice forms an immaterial issue. (Fry *v.* Bennett, 5 Sandf. 54.)

[5] Buhler *v.* Wentworth, 17 Barb. 649; Hollenbeck *v.* Clow, 9 How. Pra. Rep. 289; Ormsby *v.* Brown, 5 Duer, 665; Payson *v.* McComber, 3 Allen (Mass.) 69; Miller *v.* Graham, 1 Brevard, 283; Smith *v.* Smith, 39 Penn. St. Rep. 411; and see Kelly *v.* Craig, 9 Humph. 215; *contra*, Attebury *v.* Powell, 29 Miss. (8 Jones) 429.

the whole declaration, plead as to part of the declaration, a special plea of apology and payment into court under the statute 6 & 7 Vict. ch. 96.[1] Although a defendant may be allowed with not guilty to plead the mere fact that the words were a fair comment without malice, he cannot with not guilty interpose a plea alleging the existence of certain facts, and that the alleged libel was a fair comment on transactions of public notoriety. The fact of fair comment is involved in not guilty.[2]

§ 354. A defendant, to avail himself of the defense of truth, must set it up as a defense by plea or answer.[3] The defense of truth may be interposed, although the power to punish for the offense has been tolled by lapse of time,[4] or although the plaintiff has been tried upon the charge and acquitted[5] or pardoned.[6]

§ 355. That the justification on the ground of truth must be as broad as the charge, and must justify the pre-

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To a declaration containing three counts for three distinct libels, the court refused to allow the defendant to plead one general plea of justification. (Honess *v.* Stubbs, 7 C. B. N. S. 555.) Inconsistent defenses allowed. (Horton *v.* Banner, 6 Ky. (Bush) 596; Weston *v.* Lumley, 33 Ind. 486.)

[1] O'Brien *v.* Clement, 15 M. & W. 435; 3 D. & L. 676; 15 Law Jour. Rep. 285, Ex.

[2] Lucan *v.* Smith, 1 Hurl. & N. 481; 20 Jur. 1107. The fact that the same matter which is specially pleaded might be given in evidence under the general issue, is not always a sufficient ground for rejecting the special plea. (Parker *v.* McQueen, 8 B. Monroe, 16.) In an action for a libel contained in two letters published in a newspaper, the defendant pleaded that the second letter (itself actionable) was a fair comment upon the facts in the first letter; held bad. (Walker *v.* Brogden, 19 J. Scott, N. S. 64.) See § 409, *post.*

[3] *Ante*, § 211 to 216, note 4 p. 327, § 409, *post;* Manning *v.* Clement, 7 Bing 367; 2 Greenl. Ev. 424; Hagan *v.* Hendy, 6 R. I. 335; Frederitz *v.* Odenwalder, 2 Yeates, 243; Barrow *v.* Carpenter, 1 Cliff. 204. The plea of truth is an issuable plea. (Woodward *v.* Andrews, 1 Brev. 310.)

[4] Ankin *v.* Westfall, 14 Johns. 234. Where the words were actionable *per se*, a plea of not guilty within two years, held good. (Quinn *v.* Wilson, 13 Irish Law Rep. 381.)

[5] Cooke *v.* Field, 3 Esp. 133; England *v.* Burke, *Id.* 80.

[6] *Ante*, note 4 p. 327, and § 158.

cise charge, has already been considered.[1] (§ 212.) We have now but to point out some other requisites of a plea or answer on the ground of truth. These depend upon whether the charge is general or specific. Where the charge is in general terms, the answer must state the facts which show the charge to be true. It is not sufficient merely to allege that the charge is true.[2] As if the charge be that the plaintiff is a swindler,[3] or a thief, or a perjurer, or a murderer,[4] or that he stole a watch,[5] or certified a lie,[6] or was of intemperate habits,[7] or received a bribe,[8] or perverted the law.[9] The distinction seems to

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[1] Where the charge was, "I caution you against M. W. (plaintiff), she came here an excommunicated prostitute, *the outcast of a barrack*, held that a plea that plaintiff was a prostitute, was not a justification. (Wright *v.* Sullivan, Hayes Ir. Ex-Rep. 104.)

[2] Fry *v.* Bennett, 5 Sandf. 69; Lawton *v.* Hunt, 4 Rich. 458; Atteberry *v.* Powell, 29 Mis. (8 Jones), 429; Billings *v.* Waller, 28 How. Pra. Rep. 97; Barrows *v.* Carpenter, 1 Cliff. 204; Cook *v.* Tribune Asso., 5 Bl. C. C. 352; Bruton *v.* Downes, 1 Fost. & F. 668; Holmes *v.* Catesby, 1 Taunt. 543. Where a particular meaning is alleged, it is not sufficient to say the charge is true, with the addition of time, place, and circumstance. (Fidler *v.* Delavan, 20 Wend. 57.) A man cannot defame in one sense and justify in another. (*Id.*; Kerr *v.* Force, 3 Cr. C. C. 8.) But since the common law procedure act in England, a general plea of justification is allowed there, but in such case the plaintiff is entitled to particulars of the charges intended to be justified. (Behrens *v.* Allen, 8 Jur. N. S. 118; Jones *v.* Bewick, Law Rep. V, C. P. 32.)

[3] J'Anson *v.* Stuart, 1 T. R. 748. It is not a justification of a charge of plaintiff being a swindler to allege that defendant delivered to plaintiff goods to sell on commission, that he failed to return them or to account for them, and that he made an assignment for the benefit of his creditors. (Herr *v.* Bamberg, 10 How. Pra. Rep 128.)

[4] Anon. 3 How. Pra. Rep. 406; 4 *Id.* 98, 347; Sayles *v.* Wooden, 6 *Id* 84; Johnson *v.* Stebbins, 5 Ind. 364. Where the words complained of were, "She is a thief, and has stolen my gold pen and pencil," held that the answer might properly allege a variety of thefts by the plaintiff of different articles, as going to justify the words "She is a thief." (Jaycocks *v.* Ayres, 7 How. Pra. Rep. 215.) A charge of forgery against a whole community was held to be justified by alleging a falsification of poll books. (Fellows *v.* Hunter, 20 Up. Can. Q. B. Rep. 382.)

[5] Anibal *v.* Hunter, 6 How. Pra. Rep. 255.

[6] Jones *v.* Cecil, 5 Eng. 593.

[7] Buddington *v.* Davis, 6 How. Pra. Rep. 401.

[8] Van Ness *v.* Hamilton, 19 Johns. 349.

[9] Riggs *v.* Denniston, 3 Johns. Cas. 198. In an action of slander, when the charge

be that where the charge is a conclusion or inference from certain facts, there the plea must set up the facts which warrant such an inference; but where the charge is of some specific act or acts, there it is sufficient if the plea allege that the charge is true. Thus if it be said of a man, that he is a swindler, this is an inference from his actions and which can be proved only by showing acts of fraud on the part of the plaintiff amounting to swindling; and, therefore, as we have seen, to justify a charge of being a swindler, the plea must allege the facts upon which the defendant relies to make out the charge. Where the defendant attempted to justify a charge of fraud by setting up in his plea that he and plaintiff had had dealings together, and defendant believing that plaintiff had cheated him, and in consequence of such belief, and believing said charge to be true, he published the same, the plea was set aside as embarrassing and uncertain.[1] When the charge is general, and the answer merely an averment that the charge is true, the plaintiff *may*, under the New York Code, apply to have the answer made "definite and certain;" but he is not obliged to do this, he *may* lie by, and on the trial object to the reception of any evidence in support of such a plea, either in bar or in mitigation.[2]

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is made directly, the plea of justification should aver the truth of the charge, as laid in the declaration; but when the charge is made by insinuation and circumlocution, so as to render it necessary to use introductory matter to show the meaning of the words, the plea should aver the truth of the charge which the declaration alleges was meant to be made. (Snow *v.* Witcher, 9 Ired. 346; and see Behrens *v.* Allen, 3 Fost. & F. 135.)

[1] Hennessey *v.* Morgan, 8 Ir. L. R. N. S. lxix, Appendix.

[2] Wachter *v.* Quenzer, 29 N. Y. 553; Tilson *v.* Clark, 45 Barb. 181; and see Brickett *v.* Davis, 21 Pick. 404. Generally, upon the trial the plaintiff cannot object to the insufficiency of a plea of justification. (Evans *v.* Franklin, 26 Mis. (5 Jones,) 252), as he might have demurred; but if the justification be proved, the defendant is entitled to a verdict on that plea. (Edmonds *v.* Walter, 3 Stark. R. 7); and see Churchill *v.* Hunt, 2 B. & A. 685; 1 Ch. 480; *contra*, as to a notice of justification. (Thompson *v.* Bowers, 1 Doug. 321.) Held to be error for the court to charge of its own motion that the plea is so defective as not to be available to the defendant. (Bryan *v.* Gurr, 27 Geo. 378.)

§ 356. As to specific charges. Where the charge is specific, there the answer need only to allege that the charge is true. Thus in an action for calling the plaintiff thief, and saying he stole two sheep of J. S., the defendant pleaded that the plaintiff stole the same sheep, by reason of which he (defendant) called plaintiff thief, as well he might, and the plea was held good.[1] And so where the charges were of theft of certain articles specified, and of practicing prostitution, specifying instances;[2] and where the charge was that the plaintiff, as inspector of drugs, had improperly passed an adulterated article, an answer merely alleging the charge to be true was held to be sufficient.[3] A plea that the defamatory matter "is true in substance and effect" means that it is true in every material particular.[4] To a charge of being a liar, a plea that "sundry honest men, to wit, A. B.," &c., naming them, "and others, believed and considered the plaintiff not to be a man of truth, but addicted to falsehood," would not be sufficient justification.[5]

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[1] 1 Rolle Abr. 87. Where the original charge is in itself specific, the defendant need not further particularize it in his plea. (1 Stark. Slan. 478.)

[2] Steinman *v.* Clark, 10 Abb. Pra. R. 132.

[3] Van Wyck *v.* Guthrie, 4 Duer, 268. A general plea averring the plaintiff's residence in O. county, his being known to divers citizens there, and having a bad reputation among them, is good. (Cooper *v.* Greely, 1 Den. 347.)

[4] Weaver *v.* Lloyd, 4 D. & R. 230. A plea to an action for libel purporting to be the report of a trial "that the alleged libel was in substance a true report of the trial," was held bad on demurrer. (Flint *v.* Pike, 6 D. & R. 528; 4 B. & C. 473.) To a declaration for an alleged libel published in a newspaper, purporting to be an account of the trial of an action, the plea stated that at the trial the counsel made the speech set out in the alleged libel, and that certain witnesses proved all that had been so stated; held bad, on demurrer, for that the plea ought to have detailed such evidence, and shown the truth of the facts so stated, and not merely have stated the conclusion which the party himself drew from the evidence. (Lewis *v.* Walter, 4 B. & A. 605.)

[5] Brooks *v.* Bemiss, 8 Johns. 455; see Wilson *v.* Fitch, to be reported, 40 or 41 Cal. Under a plea of justification on the ground of truth, the defendant cannot show that he believed the charge true. (Hix *v.* Drury, 5 Pick. 296.) Justification of a libel, that from what had been said there was a reason for thinking the imputation was true; held bad on demurrer, unless it is stated what had been said, and by whom. (Lane *v.* Howman, 1 Price, 76.) To constitute a justification, the answer should aver the truth

§ 357. The facts which show the charge to be true must be stated with certainty,[1] so that the court may see whether the defendant was justified in what he published;[2] and (when a reply was necessary) so that the plaintiff might have an opportunity of denying and taking issue upon the facts alleged; and it was no excuse for general pleading that the subject comprehended a multiplicity of facts tending to prolixity, nor that the plea was not more general than the charge.[3] Where a declaration stated that plaintiff was lawfully possessed of mines and of ore gotten from them, and was in treaty for the sale of the ore, and that the defendant published a malicious, injurious, and unlawful advertisement, cautioning persons against purchasing the ore, &c., *per quod* he was prevented from selling; to which the defendant pleaded in justification, that the shareholders in the mines thought it their duty to caution persons against purchasing the ore, &c., (pursuing the words of the advertisement); this plea was held ill on special demurrer; first, because it did not disclose the names of the adventurers, or who they were; and secondly, because it did not show that the defendant made the publication under the direction of the shareholders.[4] And where the plaintiff, a justice of the peace,

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of the defamatory matter charged. It is not sufficient to set up the facts which only tend to establish the truth of such matter. (Thrall *v.* Smiley, 9 Cal. 529.) Where it was alleged that the defendant spoke of the plaintiff, "I am told M. (plaintiff) was the man who killed the pedler, and I believe it," a plea which averred that defendant was told plaintiff was the the man who murdered the pedler, and that the defendant did believe it, was held bad. (Muma *v.* Harmer, 17 Up. Can. Q. B. Rep. 293.) Where the charge was: "There is no doubt but that he (plaintiff) *abstracted* the cable," innuendo stole it. A plea that it had been rumored that a party of persons including the plaintiff had taken said cable, held no justification. (Ede *v.* Scott, 7 Ir. L. R. N. S. 607.)

[1] Van Ness *v.* Hamilton, 19 Johns. 349; Riggs *v.* Denniston, 3 Johns. Cas. 198. A plea of justification is taken most strongly against the pleader; everything must be precisely alleged; it must be "certain to a certain intent in general." (Kerr *v.* Force, 3 Cr. C. C. 8.)

[2] Torrey *v.* Field, 10 Verm. 353; Johnson *v.* Stebbins, 5 Ind. 364.

[3] Van Ness *v.* Hamilton, 19 Johns. 349.

[4] Rowe *v.* Roach, 1 M. & S. 304.

brought an action against the defendant for charging him with pocketing all the fines and penalties forfeited by delinquents whom he had convicted, without distributing them to the poor, or in any manner accounting for a sum of £50 then on hand, the defendant pleaded that the plaintiff was a justice of the peace, and that during the time he acted as such he convicted sundry persons in sundry sums of money, for divers offenses against divers statutes, which sum, amounting together to £50, he received of the persons so convicted, and had not paid over the same as required by law. On special demurrer, the plea was held bad (not sufficiently certain) for not stating the names of the persons who paid said sums of money, and the amount which each person paid.[1] Where the libel stated that the plaintiff, as manager of the opera, employed his critics in attacking, in corrupt and purchased newspapers, the females of his company, it was held that the justification of such a charge must state the names of the critics, of the females, and of the corrupted newspapers, and the substance of the articles, and the time and place of their publication.[2] But where the libel charged that certain exhibitions of opera by the plaintiff were an unfit resort for respectable people, and that they were attended by persons of certain specified immoral and illegal occupations or pursuits—held that an answer justifying such charge need do no more than reaffirm the statement contained therein, and need not specify the names of the persons who attended such exhibitions; and certainly this will be the case where the defendant alleges that the names of such persons are unknown to him.[3] Where the charge was that the plaintiff made himself invisible on account of too much borrowing and not pay-

[1] Newman *v.* Bailey, 2 Chit. R. 665.

[2] Fry *v.* Bennett, 5 Sandf. 54.

[3] Maretzek *v.* Cauldwell, 2 Robertson, 715.

ing, innuendo that plaintiff ran away, held that an answer which stated "it is true the plaintiff made himself invisible on account of too much borrowing and not paying, that is, ran away," was insufficient.[1] And in an action of slander in charging the plaintiff, a pawnbroker, with the practice of duffing, *i. e.* of doing up damaged goods and pledging them again, a plea alleging that the plaintiff did do up *divers* damaged goods and repledge to divers persons, &c., was, on special demurrer, held bad, for not stating specific instances and persons.[2] And where the libel charged an attorney with general misconduct, viz. gross negligence, falsehood, prevarication, and excessive bills of costs in the business he had conducted for the defendant, a plea in justification repeating the same general charges, without specifying the particular acts of misconduct, was, upon demurrer, held insufficient.[3] A declaration alleged that plaintiff was cashier to Q., and that defendant, in a letter addressed to Q., wrote, "I conceive there is nothing too base for him (plaintiff) to be guilty of." Plea, in justification, alleged that plaintiff signed and delivered to defendant an I. O. U., and afterwards, on having sight thereof, falsely and fraudulently asserted that the signature was not his; and the plea averred that the libel was written and published solely in reference to this transaction. Held a sufficient justification, as the libel must be understood with reference to the subject-matter.[4] Where the defendant, a railway corporation, published a placard

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[1] Wachter *v.* Quenzer, 29 N. Y. 552. A charge of moral obliquity must be proved by some act done *mala fide*. (Kerr *v.* Force, 3 Cr. C. C. 8.)

[2] Hickinbotham *v.* Leach, 2 Dowl. Pra. Cas. N. S. 270; 10 M. & W. 361. To an action for slander in charging the plaintiff with stealing corn and fodder from various persons, a plea of justification leaving blanks for the dates and amounts would be bad on special exception, but cannot be attacked on a general exception. (George *v.* Lemon, 19 Texas, 150.)

[3] Holmes *v.* Catesby, 1 Taunt. 543.

[4] Tighe *v.* Cooper, 7 El. & B. 639; 21 Jur. 716. A plea of justification need not meet the exact words of the libel, but may adopt the sense put by the innuendo, and justify that. (O'Connor *v.* Wallen, 6 Irish Law Rep. 378.)

headed "Caution," and containing the plaintiff's name and address, and stated that he had been convicted of travelling on its railway without having first paid his fare. In an action for libel, the declaration contained an innuendo that the defendant meant thereby that the plaintiff had attempted to defraud the company; the plea was to the effect that the plaintiff was charged and convicted as alleged; on demurrer, this plea was held good, as containing a justification of the charge and of the innuendo.[1]

§ 358. It is said that to justify a charge of crime, the plea or answer must specify the crime with certainty,[2] and show the commission of the crime with as much certainty as in an indictment for such crime.[3] In an action of slander for charging the plaintiff with having stolen the defendant's shingles, a justification stating that the plaintiff had sold the defendant shingles without authority, and afterward denied that he knew anything respecting them, without alleging that the plaintiff took them privately or feloniously, was held not to amount to a charge of larceny, and was bad as a justification.[4] To a charge of procuring an abortion, it was held not a sufficient plea that the plaintiff assisted in procuring an abortion, without allegations showing the assistance criminal.[5] Where the charge was that plaintiff "swore falsely," without reference to any judicial or other proceeding in which an oath could have been lawfully administered, a plea of justification pointing the plaintiff to the time, place, and occasion of his false swearing, and alleging the truth of

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[1] Biggs *v.* G't East. R. R., 18 Law Times, N. S. 482.

[2] Nall *v.* Hill, Pick. 325. When any circumstance is stated which describes or identifies the offense, it must be averred for the purpose of showing that it is the same offense. (Sharpe *v.* Stephenson, 12 Ired. 348.)

[3] Snyder *v.* Andrews, 6 Barb. 43; Steele *v.* Phillips, 10 Humph. 461.

[4] Shepard *v.* Merrill, 13 Johns. 475.

[5] Bissell *v.* Cornell, 24 Wend. 354.

the words spoken, was held to be good.[1] Where the charge is perjury, the plea must allege not only that the defendant testified to what was untrue, but that he did so knowingly,[2] and that the matter testified to was material.[3] If the charge be of having sworn falsely in a judicial proceeding, without the necessary averments to make the slander amount to an imputation of perjury, then a plea of justification, that the plaintiff did swear falsely in the particular proceeding, would be sufficient.[4] Where the charge is that the plaintiff perjured himself on a particular occasion, the justification must be confined to that.[5] Thus in slander for charging the plaintiff with committing perjury in making a certain statement, set out in the declaration, as a witness in a certain case, the defendant pleaded that the plaintiff did commit perjury by making that statement, and that on the same trial he committed perjury by another statement made by him on the same trial,

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[1] Sanford *v.* Gaddis, 13 Ill. 329. To an action of slander for charging the plaintiff with having forged a certain instrument of writing, the truth was pleaded in justification. Held, that such a plea could not be objected to because it avers the forged instrument to be in the plaintiff's possession or destroyed. Held, also, that in a plea with such an averment, the instrument need not be so particularly described as would be otherwise required. (Kent *v.* David, 3 Blackf. 301.)

[2] Chandler *v.* Robison, 7 Ired. 480.

[3] McGough *v.* Rhodes, 7 Eng. 625; Harris *v.* Woody, 9 Mis. 113. It is no justification to an insinuation of perjury against the plaintiff (who had swore to an assault by A. B. on him), that it did appear (which was the suggestion in the libel) from the testimony of every person in the room, &c., except the plaintiff, that no violence had been used by A. B., &c.; for *non constat* thereby that what the plaintiff swore was false. Neither is it sufficient in a justification to such a libel, where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to such parts of the supposed libel as purport to contain an account of the trial, &c., and that the said parts contain a just and faithful account of the trial, &c. (Stiles *v.* Nokes, 7 E. R. 493.)

[4] Sanford *v.* Gaddis, 13 Ill. 329. "The answer should set forth the evidence, and what was actually sworn to by the plaintiff at the time alleged" (3 Ch. Pl. 1039; Yates' Plead. 430; Woodbeck *v.* Keller, 6 Cow. 122), and the Code of New York has not altered the rule in this respect. (Tilson *v.* Clark, 45 Barb. 180; Wachter *v.* Quenzer, 29 N. Y. 553.)

[5] Palmer *v.* Haight, 2 Barb. 210.

and not set out in the declaration. On demurrer to both pleas, the first was held good, and the second bad.[1] In an action for slander in charging the plaintiff with perjury, a plea was that the words were spoken in reference to the testimony of the plaintiff on the trial of a cause, and after setting out the parties, the nature of the action, and the questions litigated, it stated the evidence given on such trial, and averred that *the words were spoken in reference to certain parts of the testimouy* (*specifying them*) *which were not material to the issue, and that the defendant was so understood by the hearers*; it was held that the words in *italic* were irrelevant.[2] A plea in an action of slander for charging the plaintiff with committing a felony, which admits the speaking of the words charged, but avers other facts in order to show that the words were not actionable, must show either that it appeared by the whole of defendant's statements, in the same conversation and company, that no felony had been committed, and therefore that there was no charge of felony, or that the charge was made known to the defendant by a third person, named in the plea, before he uttered the words.[3]

§ 359. If a material part of a plea of justification fails, the plea fails altogether.[4] Thus, in an action for libel, the declaration set out the whole of a long letter, in which the defendant imputed to the plaintiff improper conduct in various transactions which had taken place in reference to a ditch of the plaintiff's, alleged by the defendant to be a nuisance. The defendant pleaded "as to so much of the libel as related to, and charged the plaintiff with, the

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[1] Starr *v.* Harrington, 1 Smith, (Ind.) 350.

[2] Allen *v.* Crofoot, 7 Cow. 46.

[3] Parker *v.* McQueen, 8 B. Monr. 16. An averment that the plaintiff did falsely, fraudulently, and unlawfully alter a note, so as materially to change the terms and conditions thereof, is a good plea in justification of a charge of forgery. (Kerr *v.* Force, 3 Cr. C. C. 8.)

[4] Cory *v.* Bond, 2 Fost. & F. 241.

keeping of the nuisance," a plea which attempted to justify every sentence in the letter. The jury found that the plaintiff kept the ditch as a nuisance, but negatived the improper conduct imputed to the plaintiff in the letter. Held that, upon this finding, the plaintiff was entitled to a verdict.[1] Where the charge was that plaintiff had acted for spite *and lucre*, the defendant justified, but his justification failed as to *lucre*, held that the charge being *entire*, the plaintiff was entitled to a verdict,[2] and where a part only of a *divisible* charge is justified, the defendant is liable for the part not justified.[3] So where the charge was, He (plaintiff) has robbed me to a *serious amount*, the defendant in addition to the general issue, as to the words he has robbed me, pleaded that plaintiff had robbed him (defendant) of a loaf of the value of three pence, the jury found the words as laid, and that the plea was true, but were directed to assess the plaintiff's damages for the words not justified, namely, "to a serious amount," and the court in banc held the direction proper.[4]

§ 360. In some States, by statute, a notice or specification of the defense is substituted for a plea or answer. Such a notice must, it seems, contain all the material allegations of a plea or answer.[5]

§ 361. In New York, and in some other States, by statute the defendant may, *in connection with a general*

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[1] Biddulph *v.* Chamberlayne, 17 Q. B. 351. Where in an action for a libel, in reference to an advertisement by the plaintiff tending to injure the defendants, his former partners, in their trade, the defendant justified, and relied on the construction of such advertisement, as set out in the introductory part of the declaration; held, that that not supporting the inferences in the libel, the plaintiff was entitled to recover. (Chubb *v.* Flannagan, 6 C. & P. 431.)

[2] Cory *v.* Bond, 2 Fost. & F. 241.

[3] Clarke *v.* Taylor, 3 Scott, 95.

[4] Bayley & Holroyd, J. J., in the Lancaster C. P.

[5] Van Derveer *v.* Sutphin, 5 Ohio, N. S. 293; Brickett *v.* Davis, 21 Pick. 404; Shepard *v.* Merrill, 13 Johns. 475; Mitchell *v.* Borden, 8 Wend. 570; Bissell *v.* Cornell, 24 Wend. 354.

denial, and with or without a defense of justification, set up in his answer mitigating circumstances to reduce the amount of damages.[1] But it would seem that a defendant cannot set up mitigating circumstances alone, without any other answer constituting a defense, because an answer merely setting up mitigating circumstances would not raise an issue.[2] Mitigating circumstances are such circumstances as the well-established rules of law allow to be given in evidence in mitigation of damages,[3] and what those circumstances are will be considered under the head of Evidence. The question whether the facts set up are or are not such as should be permitted to be given in evidence in mitigation, is properly to be decided by the judge on the trial of the issue of fact.[4] And, therefore, although a plaintiff may move, prior to the trial, to strike out as irrelevant or redundant allegations of facts which the defendant avers he will prove on the trial in mitigation,[5] yet where there is any doubt as to whether or not the facts alleged in the answer would be received in evidence on the trial, the motion, prior to the trial, should be denied. Where a defendant seeks to mitigate damages by pleading facts and circumstances which induced him, at the time of making the charge, to believe it true, (1) the facts and circumstances must be such as would reasonably induce, in the mind of a person possessed of ordinary intelligence and knowledge, a belief of

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[1] Code of Pro. § 165; Bush *v.* Prosser, 11 N. Y. 347; Bisbey *v.* Shaw, 12 N. Y. 67; Dolevin *v.* Wilder, 34 How. Pra. R. 488; 7 Robertson, 319; Van Benschoten *v.* Yapel, 13 How. Pra. R. 97; Heaton *v.* Wright, 10 *Id.* 79; Ayres *v.* Covill, 18 Barb. 260.

[2] Newman *v.* Otto, 4 Sandf. 669; Maretzek *v.* Cauldwell, 19 Abb. Pra. R. 40; but see Van Benschoten *v.* Yaple, 13 How. Pra. Rep. 97.

[3] Graham *v.* Jones, 1 Code Rep. N. S. 181; 6 How. Pra. R. 15; Blickenstaff *v.* Perrin, 27 Ind. 527. Anything tending to disprove actual malice, although it may tend to establish the truth, is admissible in mitigation. (Bush *v.* Prosser, 11 N. Y. 347; Bisbey *v*, Shaw, 12 *Id.* 67.)

[4] Newman *v.* Harrison, 1 Code Rep. N. S. 184; Fry *v.* Bennett, 5 Sandf. 54.

[5] Van Benschoten *v.* Yaple, 13 How. Pra. R. 97.

the truth of such charge; (2) it must also appear that the defendant, before and at the time of making the charge, knew such facts and circumstances, and (3) that he was, by reason of the facts and circumstances so set forth, induced to believe in the truth of the charge. Unless it contain all these allegations, it may be stricken out on motion. Upon a motion to strike out, as redundant or irrelevant, matter set up in mitigation, the court is to see whether such matter can, by any possibility, be received in evidence; if it can, it should not be stricken out. It should not be stricken out if the court has the slightest doubt as to its inadmissibility.[1] It is supposed that, in New York, the defendant on the trial can give in evidence only such matter of mitigation as he has set up in his answer, and that if the answer does not contain any matter of mitigation, no evidence in mitigation can be admitted on the trial.[2] On an assessment of damages, where there is no answer, matter in mitigation may be received. Although matter in mitigation of damages is not a subject of demurrer, yet if set up in the answer, without its being stated that they are set up in mitigation merely, the plaintiff may infer they are set up in bar, and may demur to them.[3]

§ 362. As in other actions, the defendant may demur to the complaint; but Lord Coke said it was "an excellent point of learning in actions for slander" not to demur, but to take advantage of the declaration not disclosing a cause of action, either on the trial, or by motion in arrest of judgment.[4] It has been held that, though a

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[1] Dolevin *v.* Wilder, 34 How. Pra. Rep. 488; Gorton *v.* Keeler, 51 Barb. 475.

[2] In Indiana, it is optional with the defendant whether he will set up mitigating circumstances in his answer or not. See O'Conner *v.* O'Conner, 27 Ind. 69.

[3] Newman *v.* Otto, 4 Sandf. 668; Fry *v.* Bennett, 5 *Id.* 54; Matthews *v.* Beach, *Id.* 256; Meyer *v.* Schultz, 4 *Id.* 664; Stanley *v.* Webb, *Id.* 21.

[4] The great changes which, since Lord Coke's day, have taken place in the forms and mode of procedure, have deprived this rule of much of its value. If the words

count in slander contain some words which are actionable, and others which are not, the defendant cannot plead as to the former, and demur as to the residue, but must either plead or demur to the whole count.[1] But again it has been held, that where a libel contains several *distinct* charges, the defendant may plead or demur to particular parts of it; yet where several statements tend to one conclusion or imputation, it is not permissible to select and deal separately with one, either by plea or demurrer.[2] A defendant cannot single out some of the words in a declaration and demur to them.[3] If a count by husband and wife contains words actionable *per se*, as well as others spoken of the wife, the defendant cannot demur, but may, on the trial, object that the action for the latter words cannot be maintained by both.[4] In an action for libel, where the answer contained (1) a denial of the publication, (2) a justification, the plaintiff demurring to the answer, specifying only objections to the matter of justification, judgment was given for the plaintiff on the demurrer; held that the denial remained on the record,

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laid in the declaration are not actionable, the defendant must demur, or move in arrest of judgment. (Dorsey *v.* Whipps, 8 Gill, 457.) He cannot avail himself of the defect at the trial (Blunt *v.* Zuntz, Anthon, 180; Boyd *v.* Brent, 3 Brevard, 241) to nonsuit the plaintiff. (Lumby *v.* Allday, 1 Cr. & J. 301; 1 Tyrw. 217.) It seems to be otherwise in New York, where, on the trial, the defendant may insist that the complaint does not disclose a cause of action. It must be remembered that in New York the demurrer is general only, and that the special demurrer has been superseded by a motion to make definite and certain.

[1] Bronson, J., Root *v.* Woodruff, 6 Hill, 420, citing as to libel, Sterling *v.* Sherwood, 20 Johns. 204; Riggs *v.* Denniston, 3 Johns. Cas. 198, and saying the same rule had been applied in actions for slander, though not reported; and see Taylor *v.* Carr, 3 Up. Can. Q. B. Rep. 306. It is conceded that the rule is otherwise in England, and Clarkson *v.* Lawson, 6 Bing. 587, is cited. Held that a defendant may demur to a part of the words laid in a count for slander. (Abrams *v.* Smith, 8 Blackf. 95; Wyant *v.* Smith, 5 *Id.* 294.)

[2] Eaton *v.* Johns, 1 Dowl. Pra. Cas. N. S. 602; and see McGregor *v.* Gregory, 2 *Id.* 769; 11 M. & W. 289.

[3] Taylor *v.* Carr, 3 Up. Can. Q. B. Rep. 306.

[4] Beach *v.* Ranney, 2 Hill, 309.

and raised an issue of fact.[1] Upon demurrer to the complaint, if any of the words be actionable, there must be judgment for the plaintiff.[2] A demurrer to the complaint does not admit the intent attributed by the innuendo.[3]

§ 362*a*. There can be no counter-claim in an action of slander or libel.[4] One libel cannot be set off against another,[5] nor can damages occasioned by a libel form a counter-claim in an action for an assault.[6]

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[1] Matthews *v.* Beach, 8 N. Y. 173; but see Parrett Nav. Co. *v.* Stower, 8 Dowl. Pra. Cas. 405.

[2] Edde *v.* Waters, 4 Cr. C. C. 170.

[3] Wheeler *v.* Hames, 1 Perr. & D. 55.

[4] Jellerman *v.* Dolna, 7 Abb. Pra. R. 395 note.

[5] Seely *v.* Cole, Wright (Ohio), 681. In the Scotch Reports are to be found numerous instances of one set of words being set off against another.

[6] Macdougall *v.* Maguire, 35 Cal. 274.

CHAPTER XV.

VARIANCE.—AMENDMENT.

Allegation of pleadings and proof should correspond—Variance in New York—General rules as to variance—Immaterial variance—Material variance—Amendment.

§ 363. The general rule as to variance is that the allegations of the pleading and the proof must correspond, otherwise there is a variance, and the plaintiff fails;[1] but now in New York it is enacted by statute that "no variance between the allegation in a pleading and the proof shall be deemed *material* unless it have actually misled the adverse party to his prejudice," and when the variance is shown to be material, the court may order an amendment.[2] The following decisions upon variance are in cases not within the Code of New York.

§ 364. Ordinarily it is sufficient if the words proved correspond substantially with those alleged.[3] But although any mere variation of the form of expression is not material, the words alleged cannot be proved by showing that the defendant published the same meaning in differ-

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[1] In actions of slander and libel the language charged must be proved as laid. (Birch *v.* Benton, 26 Mis. (5 Jones), 153; Horton *v.* Reavis, 2 Murph. 380.) A variance is fatal. (Stanfield *v.* Boyer, 6 Har. & J. 248; Winter *v.* Donovan, 8 Gill, 370; Harris *v.* Lawrence, 1 Tyler, 156.) It is not sufficient to prove the substance of the charge merely. (Rex *v.* Berry, 4 T. R. 217.)

[2] Code of Proc. § 169. As to amendment of variance in Indiana (Proctor *v.* Owens, 18 Ind. 21).

[3] Coghill *v.* Chandler, 33 Mis. 115; Smith *v.* Hollister, 3 Shaw (Verm.) 695; Taylor *v.* Moran, 4 Metc. (Ky.) 127; Williams *v.* Minor, 18 Conn. 464.

ent words,[1] even if equivalent and of similar import.[2] A count for slanderous words spoken affirmatively is not supported by proof that they were spoken by way of interrogation.[3] Proof of words spoken in the second person will not support counts for words spoken in the third person, and *vice versa*.[4] Proof of a positive assertion is not admitted under an allegation of a hypothetical assertion; an allegation that the words were "he swore to a lie" is not supported by proof that the words were "he swore to a lie *if* he swore as Jones said he did."[5]

§ 365. The plaintiff need not prove all the words laid,

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[1] Smith *v.* Hollister, 3 Shaw (Verm.) 695. Within six months before suit brought, the defendant said concerning the words alleged to be actionable, but which were barred by the statute, "I never denied what I have said, and I will stand up to it." Held, that this was not a repetition of what he had previously said, and that an action could not be sustained thereon. (Fox *v.* Wilson, 3 Jones Law (N. Car.) 485.

[2] Wilborn *v.* Odell, 29 Ill. 456; Taylor *v.* Moran, 4 Metc. (Ky.) 127; Norton *v.* Gordon, 16 Ill. 38. It is not sufficient to prove words equivalent to those alleged. (Moore *v.* Bond, 4 Blackf. 458; Slocum *v.* Kuykendall, 1 Scam. 187; Olmstead *v.* Miller, 1 Wend. 506; Watson *v.* Music, 2 Mis. 29; Armitage *v.* Dunster, 4 Doug. 291; McConnell *v.* McVenna, 10 Ir. L. R. 511; Campagnon *v.* Martin, 2 W. Black. 790.) Words to the same effect are not the same words. (Fox *v.* Vanderbeck, 5 Cow. 513.)

[3] Barnes *v.* Holloway, 8 T. R. 150; Sanford *v.* Gaddis, 15 Ill. 228; King *v.* Whitley, 7 Jones Law (N. Car.) 529. If in an action of slander the words be proved to be spoken affirmatively as they are laid, the charge is supported, though it appear that they were spoken in answer to a question put by a third person. (Jones *v.* Chapman, 5 Blackf. 88.)

[4] Cock *v.* Weatherby, 5 Smedes & Marsh. 333; Miller *v.* Miller, 8 Johns. 74; Stannard *v.* Harper, 5 M. & Ry. 295; M'Connell *v.* McCoy, 7 S. & R. 223; Culbertson *v.* Stanley, 6 Blackf. 67; Williams *v.* Harrison, 3 Mis. 411; Wolf *v.* Rodifer, Har. & J. 409; Avarillo *v.* Rogers, Bull. N. P. 5; Rex *v.* Berry, 4 T. R. 217; Phillips *v.* Odell, 5 Up. Can. Q. B. Rep. O. S. 483; Sanford *v.* Gaddis, 15 Ill. 228; Rutherford *v.* Moore, 1 Cr. C. C. 388; Birch *v.* Simms, *id.* 550. Evidence of the words, "You are a broken down justice," does not support an indictment for speaking of the magistrate the words, "He is a broken down justice." (4 T. R. 217; but see Cro. Eliz. 503.) Words proved to have been spoken in the second person, sustain a count for slander in which the words are in the third person. (Daily *v.* Gaines, 1 Dana, 529; Huffman *v.* Shumate, 4 Bibb, 515.)

[5] Evarts *v.* Smith, 19 Mich. 55, § 369, post.

but he must prove enough of them to sustain the action.[1] It is sufficient if the gravamen of the charge as laid is proved,[2] and unless the additional words qualify the meaning of those proved so as to render the words proved not actionable, the proof is sufficient.[3] It is necessary for the plaintiff to prove some of the words precisely as charged, but not all of them, if those proved are in themselves slanderous; but he will not be permitted to prove the substance of them in lieu of the precise words.[4] Where the whole of the words laid in any one count constitute the slanderous charge, the whole must be proved. But, where there are distinct slanderous allegations in any count, proof of any of them is sufficient.[5] The plaintiff may prove more words than are set forth in the complaint, provided the additional words do not change the meaning

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[1] Fox *v.* Vanderbeck, 5 Cow. 513; Purple *v.* Horton, 13 Wend. 9; Nestle *v.* Van Slyck, 2 Hill, 282; Skinner *v.* Grant, 12 Verm. 456; Scott *v.* McKinnish, 15 Ala. 662; Hancock *v.* Stephens, 11 Humph. 507; Isley *v.* Lovejoy, 8 Blackf. 462; Sanford *v.* Gaddis, 15 Ill. 228; Whiting *v.* Smith, 13 Pick. 364; Loomis *v.* Swick, 3 Wend. 205; Wheeler *v.* Robb, 1 Blackf. 330; Chandler *v.* Holloway, 4 Port. 17; Berry *v.* Dryden, 7 Mis. 324; Coghill *v.* Chandler, 33 Mis. 115; Geary *v.* Connoss, Skin. 333.

[2] Hersh *v.* Ringwalt, 3 Yeates, 508; Wilson *v.* Natrous, 5 Yerg. 211; Cheadle *v.* Buell, 6 Ham. 67; Pursell *v.* Archer, Peck, 317; Miller *v.* Miller, 8 Johns. 74; Cooper *v.* Marlow, 3 Mis. 188; Barr *v.* Gaines, 3 Dana, 258; McClintock *v.* Crick, 4 Iowa, 453; Baldwin *v.* Soule, 6 Gray, 321; Scott *v.* McKinnish, 15 Ala. 662; Bassett *v.* Spofford, 11 N. Hamp. 127; Merrill *v.* Peaslee, 17 N. Hamp. 540.

[3] Sanford *v.* Gaddis, 15 Ill. 228; Merrill *v.* Peaslee, 17 N. Hamp. 540; Smart *v.* Blanchard, 42 N. Hamp. 137. The plaintiff need not prove all the words set forth in the declaration, provided he proves enough to sustain his cause of action, and the words proved do not differ in sense from those alleged. (Nichols *v.* Hayes, 13 Conn 155; Nestle *v.* Van Slyck, 2 Hill, 282; McKee *v.* Ingalls, 4 Scam. 30; Scott *v.* Renforth, Wright, 55.)

[4] Easley *v.* Moss, 9 Ala. 266; Morgan *v.* Livingston, 2 Rich. 573; Creelman *v.* Marks, 7 Blackf. 281; Patterson *v.* Edwards, 2 Gilman, 720. Although the libel read in evidence contained matter in addition to that set out in the declaration, there is no variance if the additional part do not alter the sense of that which is set out. (M'Coombs *v.* Tuttle, 5 Blackf. 431; Cooper *v.* Marlow, 3 Mis. 188; Rutherford *v.* Evans, 6 Bing. 451; 4 Car. & P. 74.) Thus, in Tabart *v.* Tipper, 1 Camp. 350, the rhymes (see *ante*, note 5, p. 446) were set out in the declaration without the line in Latin which followed them; it was held the omission was immaterial.

[5] Flower *v.* Pedley, 2 Esp. 491.

of those set forth,[1] and words spoken at different times may be given in evidence on one count.[2]

§ 366. An action for slanderous words imputing to the plaintiff misconduct as a constable, is not sustained by proving words imputing misconduct to him, as an agent of the executive of one State, for the arrest, in another State, of a fugitive from justice.[3] Where the words were alleged to have been spoken of and concerning the plaintiff as treasurer and collector of certain tolls, and the innuendo corresponding thereto, and the proof was only of his being treasurer, and he failed in making out his appointment to be collector; held, that for want of such proof he was properly nonsuited.[4] For words spoken of a physician, alleging that he was not entitled to practice as such; held, first that the plaintiff was bound to prove not only that he practised as a physician, but that he practised *lawfully*.[5] In an action for these words spoken by defendant of the plaintiff in his profession of a physician: "Dr. S. has upset all we have done, and die he (the patient) must." It was proved that the plaintiff had practised several years as a physician, and having been called in during the absence of a physician who with the defendant attended the patient, the defendant, as apothecary, made up the medicines prescribed by the plaintiff

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[1] Wilborn *v.* Odell, 29 Ill. 456. In Bourke *v.* Warren, 2 C. & P. 307, a letter was set out as inducement alleged to contain "the words and matters following;" when the letter was read it was found to contain all that was stated in the declaration and something more, held, not a material variance—of course the something more did not qualify what went before; and see Morrow *v.* McGaven, 1 Ir. L. R. 579. In Crotty *v.* Morrissey, 40 Ill. 477, held no variance between "he stole $200 from me" and "he stole $200 from me, when I was drunk," but that there was a variance between "he stole part of the money he collected in the Catholic church" and "he stole part of the money he collected in the Catholic church in Seneca."

[2] Churlter *v.* Barrett, Peake, 32.

[3] Kinney *v.* Nash, 3 N. Y. 177.

[4] Sellers *v.* Killen, 4 B. & Cr. 655; 7 D. & Ry. 121.

[5] Collins *v.* Carnegie, 3 Nev. & M. 703; 1 Ad. & El. 695.

for the patient in question. *Quære*, whether, on this declaration, it was necessary for the plaintiff to produce a diploma, or other direct evidence that he had taken a degree in physic, in order to maintain the action.[1] Where the declaration alleged the plaintiff to be an attorney, and that the words were spoken of him in his professional character, the words being actionable without any reference to such character; held, that mere proof of his having been admitted, without showing that he had practised or had taken out his certificate, was not a fatal variance.[2]

§ 367. The following have been held to be immaterial variances: the date of publication;[3] a difference in the tense of the words, as *had* for *has;*[4] the transposition of the names of the parties to the suit, as a witness in which the plaintiff was charged with having sworn falsely;[5] alleging that the offense was committed on Saturday instead of Sunday;[6] a discrepancy in the title of a paper;[7] where it was alleged that the publication was in the presence of B., held not necessary to prove such allegation.[8] On an allegation that the defendant charged

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[1] Smith *v.* Taylor, 1 N. R. 196. In an action by an apothecary, what is sufficient proof of his qualifications as such. (Wogan *v.* Somerville, 1 Moore, 102; 7 Taunt. 401.)

[2] Lewis *v.* Walter, 3 B. & Cr. 138; 4 D. & R. 810.

[3] Thrall *v.* Smiley, 9 Cal. 529; Gates *v.* Bowker, 18 Verm. (3 Washb.) 23; Commonwealth *v.* Varney, 10 Cush. 402; Potter *v.* Thompson, 22 Barb. 89.

[4] Wilborn *v.* Odell, 29 Ill. 456.

[5] Teague *v.* Williams, 7 Ala. 844. In an action of slander, the plaintiff alleged that the slanderous words were spoken relative to testimony of the plaintiff in a suit in which S. was plaintiff and H. defendant. Held, that evidence *aliunde* was admissible to show that the record of an action by S. and W. against H. was the action referred to in the declaration, and that there was no variance. (Hibler *v.* Servoss, 6 Mis. 24.)

[6] Sharpe *v.* Stephenson, 12 Ired. 348.

[7] The State *v.* Jeandell, 5 Harring. 475.

[8] Goodrich *v.* Warner, 21 Conn. 432. But where the allegation was a speaking in the hearing of "divers citizens," and the proof was of a speaking in the hearing of one person, and he not a citizen, it was held a fatal variance. (Chapin *v.* White, 102 Mass. 139.)

the plaintiff with perjury in a suit of A. and B. *v.* C. and D., the variance is not fatal if it be shown that the charge was made in reference to the case of a cross-bill, by one of the defendants in such case, against the complainant and co-defendants.[1] And where the declaration on a libel stated that certain prosecutions had been preferred against M., and that, "in furtherance of such proceedings," certain sums of the parish funds had been appropriated to discharge the expenses; but the libel charged the money to have been so applied after the proceedings had terminated: held, that it being immaterial to the defamatory character of the libel when the money was so applied, the variance was immaterial.[2] So a slight variance in the names of the defendants in the indictment, as set forth in the declaration and contained in the record, may be cured by parol proof of the identity of the persons.[3] Where the words charged in one count were "He is a thief," and in another, "He is a thief, and stole the hay and hay-seed from D.'s barn," and the proof was that the defendant said, at one time, that he was "a thief, and stole the hay-seed out of the barn," and at another that he had "stolen hay and hay-seed that had belonged to D.," it was held that the words charged were sufficiently proved.[4]

§ 368. The following are additional instances of immaterial variance:

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[1] Wiley *v.* Campbell, 5 Monr. 560. A charge of false swearing, in a proceeding between A. and B., held sustained by proof of a proceeding between A. and B. and wife. (Dowd *v.* Winters, 20 Mis. (5 Bennett), 361.)

[2] May *v.* Brown, 3 B. & Cr. 113; 4 D. & R. 670. It is a general rule that the variance between the allegation and the proof will defeat a party, unless it be in respect of matter which, if pleaded, would be material. (*Id.*) Where the words are actionable without the inducement, the insertion of what is not material and not proved does not occasion a variance of which advantage can be taken. (Cox *v.* Thomason, 2 Cr. & J. 361; 2 Tyrw. 411.)

[3] Hamilton *v.* Langley, 1 M'Mullan, 498.

[4] Williams *v.* Miner, 18 Conn. 464.

ALLEGATION.	PROOF.
He stole hogs.	He stole a hog.[1]
The girl that *hired* with us.	The girl that *lived* with us.[2]
A. committed forgery.	A. and B. committed forgery.[3]
We supposed that they had become aware of the fact.	We supposed that they had by this time become aware of the fact.[4]
He stole my staves and nails.	He is a damned rogue, for he stole my staves and nails, and I can prove it.[5]
She has had a bastard child.	If I have not been misinformed, she had a bastard child.[6]
A. has had a baby.	We hear bad reports about some of your girls; A. has had a baby.[7]
He is a *strong* thief.	He is a thief.[8]
He has been working for me some time, and has been robbing me all the while.	He has worked for me some time, and has been continually robbing me.[9]

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[1] Barr *v.* Gains, 3 Dana, 258.

[2] Robinett *v.* Ruby, 13 Md. 94.

[3] Nichols *v.* Hayes, 13 Conn. 155. But words spoken of a husband or of a wife will not support an allegation of words spoken of both of them. (Davis *v.* Sherron, 1 Cr. C. C. 287.)

[4] Smiley *v.* McDougal, 10 Up. Can. Q. B. Rep. 113.

[5] Pasley *v.* Kemp, 22 Mis. (1 Jones), 409.

[6] Treat *v.* Browning, 4 Conn. 408.

[7] Robbins *v.* Fletcher, 101 Mass. 115.

[8] Burgis's Case, Dyer, 75.

[9] Doncaster *v.* Hewson, 2 Man. & Ry. 176.

ALLEGATION.	PROOF.
You are perjured.	Are you not afraid, as you have perjured yourself?[1]
Mr. K.'s wife is a whore.	She (Mr. K.'s wife) is a whorish bitch.[2]
You stole *one* of my sheep.	You stole my sheep and killed *it*.[3]
Riot.	Riot and assault.[4]
Poppenheim is a very bad man; he is a calf-thief, and the records of the court will prove it.	Poppenheim is a very bad man; he is a calf-thief; he has been indicted for calf-stealing, and the records of the court will prove it.[5]
Your (plaintiff's) house is a bawdy house, and no respectable person will live in it.	You (plaintiff's wife) are a nuisance to live beside of. You are a bawd, and your house no better than a bawdy house.[6]
Ware Hawk, you must take care of yourself there, *mind what you are about.*	Ware Hawk, you must take care of yourself there.[7]

§ 369. It was held a material variance where the declaration alleged that the defendant charged the plaintiff

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[1] Commons *v.* Walters, 1 Port. 377.

[2] Scott *v.* McKinnish, 15 Ala. 662.

[3] Robinson *v.* Wallis, 2 Stark. Rep. 194; the word *it* showing that only one sheep was meant.

[4] Hamilton *v.* Langley, 1 M'Mullan, 498.

[5] Poppenheim *v.* Wilkes, 1 Strob. 275.

[6] Huckle *v.* Reynolds, 7 C. B. N. S. 114.

[7] Orpwood *v.* Barkes, 4 Bing. 261; s. c. Orpwood *v.* Parkes, 12 Moore, 492.

with a crime, and the proof disclosed merely that defendant said he supposed the plaintiff to be guilty of such crime.[1] Where the declaration charged the defendant with speaking slanderous words, and the proof was that he procured another to speak them;[2] where the declaration charged the defendant with speaking defamatory words, and the proof was that defendant signed a written complaint charging the plaintiff with larceny;[3] where the declaration charged the defendant with saying that plaintiff, a single woman, had had a child, and the proof was that defendant said, in his opinion plaintiff was pregnant with child.[4] An allegation of slander as to the cleanliness of the person of plaintiff (a cook), as of the defendant's actual knowledge, held, not supported by proof of words as to the defendant's belief or understanding only.[5] An allegation that words were spoken concerning three plaintiffs (partners) in their joint trade, is not supported by proof that the words were addressed to one of the plaintiffs personally.[6] Where the words set forth, in their ordinary sense, import a charge of crime, if they are proved to have been so spoken in connection with other words as to rebut the idea of criminality, there is a fatal variance;[7] and where an innuendo gives a specific meaning to the

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[1] Dickey *v.* Andros, 32 Verm. (3 Shaw), 55. Where, in case for a malicious prosecution, the declaration alleged that an express charge of felony was made against plaintiff, but it appeared that the defendant had only deposed to a suspicion that he had committed it, held no variance, it being the only meaning which could be imputed to the accusation. (Davis *v.* Noake, 6 M. & S. 29.)

[2] Watts *v.* Greenlee, 1 Dev. 210.

[3] Hill *v.* Miles, 9 N. Hamp. 9.

[4] Payson *v.* Macomber, 3 Allen (Mass.), 69. A count in slander, alleging that the defendant charged upon the plaintiff an act of fornication, witnessed by a particular person, is not sustained by proof of words charging an act of fornication witnessed by another person, or by proof of words implying a charge of habitual fornication and lewdness with the person named in the declaration. (*Id.*)

[5] Cook *v.* Stokes, 1 M. & Rob. 237.

[6] Solomons *v.* Medex, 1 Stark. Cas. 191; and see Davis *v.* Sherron, 1 Cr. C. C. 287.

[7] Edgerly *v.* Swain, 32 N. Hamp. 478.

language published, that meaning must be proved, or there will be a variance.[1] Where the declaration in an action of slander alleges that the words spoken were in reference to an oath taken by the plaintiff before the register and receiver of a land office, touching the entry of land, proof of an oath taken before a notary public concerning the same subject-matter, does not support the allegation;[2] and where the declaration for maliciously charging the plaintiff with felony stated that the defendant went before R. C. Baron *Waterpark*, of *Waterfork*, in the county of, &c., and the proof was that his title was Baron Waterpark, of *Waterpark*, &c.; held a fatal variance.[3] Where the libel given in evidence contained two references (showing it to be the language of a third person respecting the plaintiff), and which were omitted in the libel set forth in the declaration; held, that the meaning of the paragraphs being different, the variance was fatal.[4] An action upon a libel charging in one count that the defendant published it as purporting to be a letter from A. to B., and in another charging generally that the defendant published the libellous matter; held not to be sustained by proof of a publication wherein the defendant stated that in a debate in the Irish House of Commons several years before, the attorney-general of Ireland had read such a letter, and then stating the libellous matter as said by him in commenting upon that letter; for it was said the characters of the several libels were essentially different, though the

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[1] Williams *v.* Stott, 1 Cr. & M. 675; 3 Tyrw. 668; *ante*, § 338. In a declaration for slander the words charged to have been published were, "You have murdered your little girl;" innuendo the infant daughter of plaintiff. On the trial it appeared that the child was illegitimate, but that the plaintiff was *in fact* the father. It was objected that the innuendo implied a child born in wedlock, and that there was a variance. The objection was sustained, and the plaintiff was non-suited. (Foote *v.* Rowley, 2 Law Reporter, 138, in appendix, *post.*)

[2] Phillips *v.* Beene, 16 Ala. 720.

[3] Walters *v.* Mace, 2 B. & A. 756; 1 Chit. 507.

[4] Tabart *v.* Tipper, 1 Camp. 353.

slander imputed might be the same.[1] Where the libel given in evidence was contained in a book published by the defendant respecting William Cobbett, entitled "The Book of Wonders," and was as follows: "Many well intentioned persons have expressed their surprise that the *enlightener* should have been willing to accept of a seat in corruptions' den purchased with the bank notes of a man whose incapability and baseness he had so powerfully exposed. To convince such persons that such line of conduct was strictly patriotic, we have only to assure them that in so doing, he was walking in the footsteps of that venerable veteran whose creed is the criterion of excellence (see No. 195), and who, in an article of that creed, has laid it down as a maxim that we must, in fighting the enemy, not reject the use of even despicable and detestible men. Cobbett, v. 32, p. 82." The libel as set forth in the declaration omitted the words and figures, "see No. 195," and "Cobbett, v. 32, p. 82." It was held a fatal variance; for upon reading the declaration the libel would be understood to mean, that the defendant had himself made the assertions respecting the plaintiff, but from the libel itself it appears that the paragraph was written with intent to expose the conduct, not of the plaintiff, but of another person.[2]

§ 370. An indictment for a libel charged that the defendant set up, in public, a board on which a painting or picture of a human head, with a nail driven through the ear, and a pair of shears hung on a nail, and the proof was that a human head, showing a side face, with an ear, a nail driven through the ear, and a pair of shears hung on

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[1] Bell *v.* Byrne. 13 East, 554.

[2] Cartwright *v.* Wright, 5 B. & Ald. 615. Where the words alleged were, "My sarcastic friend by leaving out," &c., and the proof was, "My sarcastic friend *Moros* by leaving out," &c., held a material variance, (Tabart *v.* Tipper, 1 Camp. 350); leaving out the words "of" and "which," although they did not materially alter the sense, held a variance. (Cooke *v.* Smith, McClel. 250.)

the nail, was inscribed or cut in the board by means of some instrument, but was not painted. Held, that there was a fatal variance between the allegation and the proof, and that the defendant must be acquitted.[1] In an action of slander, one of the counts charged the defendant with having made a voluntary affidavit, and caused certain false statements to be written therein, to wit: "that there was a certain quantity of American soap, which to his certain knowledge was sold at Curaçoa (by the plaintiff) at six dollars, current money." The affidavit, as offered in evidence by the plaintiff, stated the same words, except that the words "per box" were added after the words "six dollars." Held, that the variance was fatal.[2] The averment was that A., before a magistrate, maliciously charged B. with felony; the information contained a mere charge of tortious conversion, upon which a warrant for felony was improperly founded. The variance was held fatal.[3] If a declaration count upon a charge of perjury upon a particular occasion, proof of a general charge of perjury is inadmissible to sustain it.[4]

§ 371. The following are additional instances of material variance:

ALLEGATION.	PROOF.
Whore.	Strumpet.[5]

[1] The State *v.* Powers, 12 Ired. 5.

[2] Wilson *v.* Mitchell, 3 Har. & J. 91.

[3] Tempest *v.* Chambers, 1 Stark. Rep. 67. In slander the allegation was, He burnt Knox's barn. The proof was that defendant added, Because one of the girls would not marry him. It was doubted if a variance. Where the inducement was of a conversation of Mr. Knox's barn which had been burnt, and that defendant said of plaintiff and of said barn, He burnt Knox's barn; proof that defendant spoke the words, He burnt Knox's barn, without proof of the colloquium respecting the burning of Mr. Knox's barn, was held insufficient. (Manly *v.* Cory, 3 U. C. Q. B. R. 380.)

[4] Emery *v.* Miller, 1 Denio, 208.

[5] Williams *v.* Bryant, 4 Ala. 44; *contra*, see Cook *v.* Winfield, 1 Stra. 555; *ante*, note 2, p. 233. A charge of being "a whore and a common prostitute" is not supported by proof of words amounting to a general charge of unchastity. (Doherty *v.* Brown, 10 Gray (Mass.) 250.)

ALLEGATION.	PROOF.
That the plaintiff, who was postmaster at F., embezzled certain papers.	Defendant had no doubt the papers were embezzled at F., or he thought the papers were embezzled at F.[1]
L. is pregnant and gone with child seven months.	Have you heard anything about L.'s being pregnant by Dr. P.[2]
Dr. F. is not a physician, but a twopenny bleeder.	If Dr. F. is a twopenny physician, I am none. I am a regular graduate and no quack.[3]
He burnt my barn, innuendo feloniously burnt.	There is the man that burnt my barn; if he was not guilty of it he would not carry pistols.[4]
He stole wheat last winter.	He, defendant, said he, plaintiff, stole away the wheat in the night, and I was well aware of it, and would have put him in jail for doing it.[5]
That persons who would otherwise have retained and employed the plaintiff, wholly declined and refused so to do.	That other persons would have recommended the plaintiff, and that the persons named in the declaration would have employed plaintiff on such recommendation.[6]

[1] Taylor *v.* Kneeland, 1 Doug. 67.
[2] Long *v.* Fleming, 2 Miles, 104.
[3] Foster *v.* Small, 3 Whart. 138.
[4] Van Keurin *v.* Griffis, 2 Up. Can. Q. B. Rep. 423.
[5] McNaught *v.* Allen, 8 Up. Can. Q. B. Rep. 304.
[6] Sterry *v.* Foreman, 2 Car. & P. 592.

ALLEGATION.	PROOF.
You swore false.	You have sworn false.[1]
She is a great thief.	She is a bad one.[2]
That plaintiff then had three or four vessels in the river.	That plaintiff had given out that there were three or four vessels in the river.[3]
This is my umbrella. He stole it from my back-door.	It is my umbrella. He stole it from my back-door.[4]
Stolen.	*Taken* out of my yard.[5]
You robbed the mail.	I am not like you, running about the country with forged deeds and robbing the mail, as you did.[6]
Plaintiff had sworn a lie, and it is in him, for he had sworn what he, defendant, could prove to be a point-blank lie.	Plaintiff had sworn off a just account, and that he, defendant, could or would prove it.[7]
You would steal, and you will steal.	A man that would do that would steal.[8]

[1] Sanford *v.* Gaddis, 15 Ill. 228.

[2] Hancock *v.* Winter, 2 Marsh. 502.

[3] Wood *v.* Adams, 6 Bing. 481; 4 C. & P. 268.

[4] Walters *v.* Mace, 2 B. & A. 756; 1 Chit. 507. The allegation concerned a thing present, and the proof a thing not present.

[5] Shepherd *v.* Bliss, 2 Stark. Rep. 510.

[6] McBean *v.* Williams, 5 Up. Can. Q. B. Rep. O. S. 689.

[7] Berry *v.* Dryden, 7 Mis. 324.

[8] Sties *v.* Kemble, 27 Penn. St. Rep. 112.

ALLEGATION.	PROOF.
I, defendant, was summoned as a grand juror at last court, but I got the court to excuse me from serving, for if I had served I would have been bound to have indicted W. for theft.	If I, defendant, had served on the grand jury, I would have been bound to have indicted Mr. Street, the plaintiff.[1]
Mismanagement or ignorance.	Ignorance or inattention.[2]
There was a collusion between A., B., and C.	There was a collusion between A. and B.[3]
You stole a dollar from A.	You stole a dollar from B.[4]
Venereal disease.	Disgraceful disease.[5]

§ 372. In New York, under the Code of Procedure, great latitude of amendment is allowed; besides the right to amend once of course, the court may order an amendment before or upon the trial, or at any time thereafter.[6]

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[1] Street *v.* Bushnell, 24 Miss. (3 Jones) 328.

[2] Brooks *v.* Blanchard, 1 Cr. & M. 779; 3 Tyrw. 844.

[3] Johnson *v.* Tait, 6 Binn. 121.

[4] Self *v.* Gardner, 15 Mis. 480.

[5] Wagaman *v.* Byers, 17 Md. 183. These following are adjudged material variances: If the declaration be for these words, "Thou *procuredst* eight or ten of thy neighbors to perjure themselves," and the jury find that he said, Thou *hast caused* eight or ten, &c., for it might be a remote cause, scilicit, without procurement. Nar. (the declaration), He *is* a bankrupt. Verdict, He will be a bankrupt within two days. Nar. He is a thief. Verdict, He stole a horse. Nar. Thou art a murderer. Verdict, He is, &c. Nar. *I know* him to be a thief. Verdict, *I think* him to be a thief. And at p. 330: Nar. Strong thief. Verdict, Thief. Nar. I say, &c. Verdict, I affirm or I doubt not. Nar. The plaintiff will do such a thing. Verdict, I think in my conscience he will do such a thing. (1 Trials per Pais, 329.)

[6] Code of Procedure, §§ 169, 172, 173.

Prior to the Code of Procedure a plaintiff was allowed to amend inducement after issue, where otherwise the right of action would have been barred by the statute of limitations.[1] Plaintiff allowed to insert additional words, but not a new cause of action.[2] Plaintiff allowed to insert a newly discovered cause of action.[3] Defendant permitted to add an additional justification.[4] Amendments too, seem to be allowed with great liberality in the courts in England; thus another count was allowed to be added after a rule for a new trial.[5] On the trial the words charged were allowed to be amended, the substance of the allegation remaining the same.[6] Plaintiff allowed to amend by alleging that the words were spoken of him in his character of auctioneer.[7] Leave to plead a justification, after verdict, denied.[8] Where the declaration alleged the publication of a libel *contained in and being an article in a certain weekly printed paper called The Paul Pry.* It was proved on the trial that the defendant gave to

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[1] Tobias *v.* Harland, 1 Wend. 93. Leave to add a new count granted (Conroe *v.* Conroe, 47 Penn. St. R. 198), but denied after right of action had been barred by statute of limitations. (Smith *v.* Smith, 45 Penn. St. Rep. 403.) An amendment is as of the commencement of the action. (Horton *v.* Banner, 6 Ky. (Bush.) 596.)

[2] Weston *v.* Worden, 19 Wend. 647. Plaintiff permitted on the trial to add a new cause of action. (Miles *v.* Van Horn, 17 Ind. 245.)

[3] Williams *v.* Cooper, 1 Hill, 637. Leave to add a justification refused. (Waters *v.* Guthrie, 2 Bailey, 106.)

[4] Graham *v.* Woodhull, 1 Car. 497. Defendant on trial allowed to strike out general issue and plead a justification. (Anon. 1 Hill (So. Car.) 251.)

[5] Wyatt *v.* Cocks, 10 Moore, 504. And see Clarke *v.* Albert, 1 Gale, 358. The statutes as to amendments to be liberally construed. (Smith *v.* Knowelden, 9 Dowl. 40.)

[6] Pater *v.* Baker, 3 C. B. 831; Foster *v.* Pointer, 9 Car. & P. 718; Saunders *v.* Bates, 1 Hurl. & N. 402; and see Lister *v.* McNeal, 12 Ind. 302.

[7] Ramsdale *v.* Greenacre, 1 Fost. & F. 61.

[8] Kirby *v.* Simpson, 3 Dowl. Pra. Cas. 791. Leave to add a plea of the statute of limitations refused. (Allensworth *v.* Coleman, 5 Dana, 315.) But granted. (Brickett *v.* Davis, 21 Pick. 404.) Where the defense was that the words complained against were parts of two *articles*, which *articles* were fair comments, on demurrer the court held the plea defective, but permitted the defendant to amend by substituting *words* for *articles*, so as to read, which words were fair comments. (Morrow *v.* McGovern, 1 Ir. C. L. 579.)

several persons to read a printed slip of paper containing the alleged libel, but it did not satisfactorily appear that such slip had been cut from The Paul Pry, the plaintiff was allowed to amend the record—without terms by striking out the words in *italics*, and this course was approved by the court in banc.[1] Where the words charged were "S. is to be tried at the Old Bailey for," &c., and the proof was "I have heard that S. is to be tried at the Old Bailey for," &c., the plaintiff had leave to amend on payment of costs.[2] Where the words alleged were "there have been many inquests held upon persons who have died *because* he attended them," and the proof was "Several have died that he (plaintiff) has attended, and inquests have been held on them," an amendment was allowed and approved in banc.[3] The court refused an amendment where it was of opinion that the words as proved did not impute an actionable charge,[4] and the court refused, on the trial, at the instance of the plaintiff to strike out superfluous averments and innuendoes, which appeared to have been introduced to create a prejudice against the defendant, and the application was not made until after the libel was read to the jury.[5]

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[1] Foster *v.* Pointer, 9 C. & P. 718, 722.

[2] Smith *v.* Knowelden, 2 M. & Gr. 561.

[3] Southee *v.* Denny, 1 Ex. 196.

[4] Camfield *v.* Bird, 3 C. & K. 56. An amendment will not be allowed, if the effect of it be to afford reasonable ground for demurrer. (Martyn *v.* Williams, 1 Hurl. & N. 817; Caulfield *v.* Whitworth, 18 Law Times, N. S. 527.)

[5] Prudhomme *v.* Fraser, 1 M. & Rob. 435. Amendment allowed (Pater *v.* Baker 3 C. B. 831; and see Huckle *v.* Reynolds, 7 C. B. N. S. 114; Saunders *v.* Bate, 1 Hurl. & N. 402; Ramsdale *v.* Greenacre, 1 Fost. & F. 61). Where the words alleged were "he was not sober," and the words proved were he was "as drunk as a sow," and the latter words were relied on as evidence of malice, and as taking away the privilege of the occasion on which the words were spoken, the amendment was denied. (Sutton *v.* Plumridge, 16 Law Times, N. S. 741.) And where the words as laid in the declaration imputed a direct charge of felony, and the proof was that the words were to the effect that *a report* was in circulation that plaintiff had committed a felony, it was held to be a material variance, and leave to amend was refused. (Pearse *v.* Rogers, 2 Fost. & F. 137.)

CHAPTER XVI.

EVIDENCE FOR PLAINTIFF.

Proof of publication; of oral publication; of publication in writing; of defendant's liability—Opinion of witnesses as to meaning—Proof of inducement; of plaintiff's good reputation; of malice; to aggravate damages—Falsehood not evidence of malice—Other publications by defendant; subsequent publications; publication after commencement of action—Defendant's ill-will to plaintiff—Ill-will to plaintiff of persons other than the defendant—The publication itself evidence of malice—Attempted justification an aggravation—Evidence in reply.

§ 373. If the publication is denied, a publication must be proved, and the publication proved must be one for which the defendant is responsible. On this subject, much has already been said in a previous chapter (Ch. vi). Whether there has been any publication by the defendant is a question of fact for the jury, but what amounts to a publication for which the defendant is responsible as publisher is a question of law for the court. If the facts were, that the defendant has posted up a libel in a public place, but had taken it down again before any one had read it, there would in point of law be no publication, but if it were doubtful whether before it was taken down some one had not read it, that would be a question of fact for the jury.[1]

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[1] Stark. Ev. tit. *Law and Fact.* In those States in which a party may be witness in his own behalf, the plaintiff may prove the speaking by the defendant of the

§ 374. The post-mark on a letter has been held *prima facie* evidence of the publication of the letter.[1] The production by the plaintiff on the trial of a letter addressed to a third person held evidence of the publication of the letter, without the oath of the person to whom the letter is addressed.[2] Where the letter produced was addressed to a person in Scotland, with the seal broken and a post-mark of a place in England, where it was proved to have been received and forwarded, held *prima facie* evidence that the letter was received by the party to whom it was addressed, and of its publication.[3] Where the defamatory matter was contained in a letter addressed by the defendant to the plaintiff, and there was no evidence of its publication, other than the production of the letter by the plaintiff, it was held not sufficient;[4] but where, in addition, it was shown that the letter was in the handwriting of the defendant, and that he had read it aloud in the presence of several persons, it was held that the letter might be read to the jury.[5] The defendant had been chairman of a public meeting, at which the libel in question had been signed by him, and ordered by the

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words complained against, although other persons than the plaintiff and defendant were present at the time. (Hess *v.* Fockley, 25 Iowa, 9.) Where the only witness to prove an oral publication was a German, the court refused to disturb a verdict for the plaintiff on the ground that it was not shown but that the words were spoken in English, which language the witness did not understand. (Hurtert *v.* Weines, 27 Mich. 134.)

[1] Shipley *v.* Todhunter, 7 C. & P. 680; Hitchon *v.* Best, 1 B. & B. 299; Rex *v.* Watson, 1 Camp. 215; Rex *v.* Johnson, 7 East, 65; Fletcher *v.* Braddyll, 3 Stark. Cas. 64; Rex *v.* Williams, 2 Camp. 505; Rex *v.* Girdwood, East P. C. 1116.

[2] Callan *v.* Gaylord, 3 Watts, 321. A post-mark does not prove itself; how proved see Abbey *v.* Lill, 5 Bing. 299; Woodcock *v.* Houldsworth, 16 M. & W. 124.

[3] Warren *v.* Warren, 1 Cr. M. & R. 250; 4 Tyrw. 850; Stocken *v.* Collen, 7 M. & W. 515.

[4] McIntosh *v.* Matherly, 9 B. Monr. 119.

[5] McCombs *v.* Tuttle, 5 Blackf. 431. See note 1, p. 142, *ante*. Evidence of the reading the libel in a public place, and of comments upon it in defendant's hearing, and that it was put up on handbills by persons unknown, was permitted to be proved. (Rice *v.* Withers, 9 Wend. 138.)

meeting to be published: on a demurrer to evidence, an affidavit of the defendant, and one of A, which the defendant in his own affidavit referred to as correct, stating that the address was ordered to be published, and admitting and justifying the publication, together with a copy of the address annexed to the affidavits, and referred to in them, were held sufficient evidence of publication.[1]

§ 375. Where a witness who heard the words spoken immediately committed them to writing, he may, on swearing that he wrote down the exact words, read what he wrote in evidence. If the words were not written down until some time after the witness heard them, although he may not read his memorandum in evidence, he may, to refresh his memory, refer to his original memorandum,[2] but not to a copy of it.[3] In actions of slander, witnesses cannot be allowed to state the impression the words used made upon their minds, but they must state positively, or as near as memory will allow, the exact words.[4]

§ 376. In an action of libel against the proprietor of a newspaper, a copy of the paper bought at the office, if alleging on its face that it was the property of the defendant, is sufficiently connected with defendant by proof, and a paragraph in it is relevant to read to the jury to show the circulation of the paper.[5] On a declaration in slander, consisting of a single count, in which the

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[1] Lewis *v.* Few, 5 Johns. 1.

[2] Sandwell *v.* Sandwell, Holt R. 295; Huff *v.* Bennett, 6 N. Y. 337.

[3] Burton *v.* Plummer, 2 Adol. & El. 343.

[4] Teague *v.* Williams, 7 Ala. 844; Alley *v.* Neely, 5 Blackf. 200; *contra*, Hawks *v.* Patton, 18 Geo. 52. Where, in an action for slander, it is important to show that the charge proved by a witness for the plaintiff had reference to a trial, it is not indispensable for the witness to give the exact words of the defendant showing such reference; but if this is desired, they should be elicited on cross-examination. (Douge *v.* Pearce, 13 Ala. 127.)

[5] Fay *v.* Bennett, 4 Duer, 247.

slanderous words were alleged to have been uttered by the defendant "on the 1st day of November, 1856, and on divers other days and times before the purchase of the plaintiff's writ," it was held, that the plaintiff might, in support of his action, prove a single uttering of the slander by the defendant on any day prior to the date of the writ.[1] A declaration alleged that the defendants published, or caused to be published, in a certain pamphlet, a libel concerning the plaintiff. From the evidence, it appeared that the defendants were instrumental in procuring the vote of a medical society expelling the plaintiff therefrom for gross immorality. The vote was published among the transactions of the society, by the regular committee of publication, of which the defendants were not members. Held, that the allegation in the declaration was not supported.[2] That one had heard of a slanderous report with regard to the plaintiff, is evidence to prove the circulation of the report, but not to prove that the defendant circulated the report.[3]

Where a declaration for publishing a libel does not purport to set it forth in *haec verba*, and a libel corresponding with the declaration is produced on the trial, if the jury believe that the defendant published any part of the libellous matter, they must find for the plaintiff.[4] It is calculated to mislead the jury to refer it to them to determine whether the defendant "in substance" spoke or published the words charged, without explaining the meaning that the law would attach to that expression in connection with the proof of the slander charged.[5]

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[1] Rice *v.* Cottrell, 5 Rhode Island, 340; Norris *v.* Elliott, 39 Cal. 72; and as to proving time of publication, see Richardson *v.* Roberts, 23 Geo. 215; Wright *v.* Britton, 1 Morris, 286.

[2] Barrows *v.* Carpenter, 11 Cush. 456.

[3] Schwartz *v.* Thomas, 2 Wash. 167.

[4] Metcalf *v.* Williams, 3 Litt. 387.

[5] Attebury *v.* Powell, 29 Mis. (8 Jones) 429.

§ 377. The words of a defamatory writing cannot be proved by parol, until it has been shown that the writing itself cannot be produced.[1] But if after the publication the defendant obtains possession of the writing and refuses to produce it, in that case secondary evidence of its contents may be given.[2] Where, to prove the defendant the *author* of a libel which the defendant had notice to produce, A. was called, who swore he received the manuscript of the libel from the defendant and returned it to him. But on cross-examination the witness stated that he had not delivered the manuscript to the defendant himself, but had delivered it to his (the witness') own servant to deliver to the defendant. A.'s servant was called, who testified that he delivered the manuscript to the defendant's servant; held, not sufficient to enable the prosecutor to give parol evidence of the existence of the paper, nor for considering the defendant as the *author* of the libel.[3]

§ 377*a*. There are instances of the courts having refused to compel the production of the writing, and at the same time have excluded secondary evidence of its contents; as, where the communication was addressed to the governor of a State respecting a State officer, the court held that the governor to whom it was addressed might exercise his own discretion as to its production, and excluded parol evidence of its contents.[4]

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[1] Simpson *v.* Wiley, 4 Porter, 215; Aspinwall *v.* Whitmore, 1 Root, 408; and see McGrath *v.* Cox, 3 Up. Can. Q. B. Rep. 332.

[2] Winter *v.* Donovan, 8 Gill, 370; Le Merchant's case, 2 T. R. 201; Layer's case, 6 State Tr. 229.

[3] Rex *v.* Pearce, Peake's Cases, 75. There is a presumption that one to whom a message has been entrusted for delivery has delivered it. (Middleton *v.* Barned, 4 Ex. 241; Wells *v.* Webber, 2 Fost. & F. 715.)

[4] Gray *v.* Pentland. 2 S. & R. 23; 4 S. & R. 420; and see Wyatt *v.* Gore, Holt's Cases, 299; Oliver *v.* Bentick, 3 Taunt. 456; Howard *v.* Thompson, 21 Wend. 319; Beatson *v.* Skene, 5 Hurl. & N. 838; M'Elveney *v.* Conellan, 17 Ir. Com. L. R. 55. Earl *v.* Vass, Boyd Kinnear's Dig. H. L. Cas. 226; 1 Shaw's App. Cas. 229; Home *v.* Bentinck, 2 Brod. & B. 130. In an action for libel, pending in the Circuit Court of the District of Columbia, the Hon. Edwin M. Stanton, Secretary of War, was

§ 378. Where the defamatory writing has been lost, secondary evidence of its contents may be given.[1] Where the libel (a song) from which the publication took place was lost, a printer was allowed to produce a similar one printed at the same time and which he proved corresponded with the one lost.[2] Where to sustain an action of libel, the proof sought to be made was, that the publication was by an affidavit, made by the defendant before a magistrate, imputing to the plaintiff the offense of hog stealing, and the only evidence of the existence of the affidavit was an imperfect memorandum of it, in the handwriting of the magistrate, who was alive and out of the State, and there was no sufficient proof of its being, in whole or in part, a copy; it was held, that the evidence was not sufficient to sustain the action.[3]

§ 379. In an action against the proprietor of a news-

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summoned as a witness to produce an original letter addressed to the former Assistant Secretary of War, Dana, which letter contained the matter alleged to be libellous. Mr. Stanton put in an affidavit respectfully submitting his objections to the production of the paper in question, and asking to be discharged from further attendance. The affidavit bore the following indorsement: Sir: Letters on file with the Heads of Departments are privileged communications. Unless their publication has been authorized, no copies should be taken at private request, and the production of the original cannot be compelled in a suit between individuals. It has been ruled that such communications cannot be made the foundation of an action for libel. Then I think the head of a department is bound not to produce a paper on file in his office. Such a letter as you describe is a privileged communication. (Signed.) J. Speed, Attorney-General." And in an action for libel, it was held that a member of Parliament could not be examined as to what was said by the plaintiff in the course of a debate in Parliament. (Plunkett *v.* Cobbett, 5 Esp. 136.) The plaintiff having failed in his application to the Senate for the removal of the injunction of secrecy, the testimony of a Senator was admitted to prove that plaintiff's nomination had been rejected by the Senate. (Law *v.* Scott, 5 Har. & J. 438.) It has been held to be optional on the part of counsel whether he will disclose what passed in court on his making a motion. (Curry *v.* Walter, 1 Esp. 456.) And held that a letter to the Chief Secretary of the Post-Master-General, is not privileged from disclosure in court on the ground that it is an official communication to a public officer. (Blake *v.* Pilfold, 1 Moo. *v.* Rob. 198.)

[1] Gates *v.* Bowker, 18 Verm. (3 Washb.) 23; Weir *v.* Moss, 6 Ala. 881.

[2] Johnson *v.* Hudson, 7 Ad. & Ell. 233, *n.*

[3] Sanders *v.* Rollinson, 2 Strobh. 447.

paper for a libel contained in it, proof that the paper came from the defendant's office, and was one copy of an edition of the same date, and alleging on its face that he is the proprietor, is proof of a publication by him;[1] and so in such an action, testimony by a subscriber for the paper, upon being shown the number of the paper containing the article in question, that it was in all respects similar to the paper left at his office, and that he had read the article contained in the paper produced in the one left at his office, is sufficient proof of publication, without producing the paper left at his office.[2] And where a witness swore that he was a printer, and had been in the office of the defendant when a certain paper was printed, and he saw it printed there, and the paper produced by the plaintiff was, he believed, printed with the types used in the defendant's office; *held* that this was *prima facie* evidence of the publication by the defendant.[3] The witness in this case might have refused to testify on the ground that he inculpated himself,[4] but as he did not claim his privilege, his testimony was properly received; and so it was held in the case of a witness who had written the defamatory matter at the request of the defendant.[5]

§ 380. Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a

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[1] The State *v.* Jeandell, 5 Harring. 475; Fry *v.* Bennett, 4 Duer, 247.

[2] Huff *v.* Bennett, 4 Sandf. 120; and see Commonwealth *v.* Blanding, 3 Pick. 304.

[3] Southwick *v.* Stevens, 10 Johns. 442; McCorkle *v.* Burns, 5 Binney, 340.

[4] Moloney *v.* Bartley, 3 Camp. 210; *ante*, § 270. Where a defendant is subpœnaed as witness for the plaintiff, he cannot object to being sworn, on the ground that any relevant questions put to him would tend to criminate himself, the plaintiff has a right to have him sworn, and defendant must answer the questions put to him, or object, as any other witness, to any question that would criminate him. (Boyle *v.* Wiseman, 10 Ex. 647.) As to interrogatory to defendant inquiring if he wrote the alleged libel, see Inman *v.* Jenkins, Law Rep. V, 738, C. P.

[5] Schenck *v.* Schenck, 1 Spencer, 208.

newspaper, under the statute 29 George III, ch. 50, and that he had occasionally applied at the stamp-office respecting the duties, was held to be sufficient evidence of his being the publisher of such newspaper.[1] And the production of a certified copy of the affidavit required by the statute 38 George III, ch. 78, with a newspaper containing the libel, corresponding with the paper described in the affidavit; held to be sufficient evidence of publication by the defendant.[2] Where, in an action for libel in a newspaper, the one put in had the place of publication "at the corner of Charles street and Hadfield street, in the parish of M.," the certificate of the stamp-office declaration was at "No. 23 Charles street," in the parish, &c.; held sufficiently to identify the newspaper as published by the declarant, within the 6th and 7th William IV, ch. 76.[3]

§ 381. The publication of a libel in a newspaper may be proved by producing the copy of the newspaper filed in the office of the commissioner of stamps,[4] or by producing a copy filed in the office of publication of such newspaper.[5] On the trial of an action for a libel in a newspaper, a witness stated that he was president of a literary institution having eighty members; that about the date of the paper proved, one was brought (he could

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[1] Rex *v.* Topham, 4 T. R. 126. Distributing newspapers containing defamatory matter and receiving pay for them through an agent, is sufficient evidence of publication by defendant. (The State *v.* Davis, 3 Yeates, 128.)

[2] Mayne *v.* Fletcher, 9 B. & Cr. 382; Rex *v.* Hunt, 9 B. & Cr. 382*n.*; Rex *v.* Hart, 10 East, 94.

[3] Baker *v.* Wilkinson, 1 Carr. & M. 399; Rex *v.* Donnison, 4 B. & Ad. 698.

[4] Cook *v.* Ward, 6 Bing. 409.

[5] Rex *v.* Pearce, Peake's Cas. 75. A witness may testify to the contents of a paper not produced, it being a printed one, always issued in the same form. (Butler *v.* Maples, 9 Wall. 766.) To prove the publication in a newspaper, it is not necessary to produce a copy actually published; it is sufficient to produce a copy, and prove that papers of the same kind were published. (Simmons *v.* Holster, 13 Min. 249.) Against a person not connected with the paper, mere proof of the publication of the paper not sufficient. (*Id.*)

not say by whom) to the reading-room of the institution, and left there gratuitously; that, a fortnight after, it was taken away without his authority, and never returned; that he had searched for it and could not find it, and believed it to be lost or destroyed; that the title of it was the same as that proved, and, as far as he could judge from a glance at it, such paper contained the libel in question, and he believed it was a copy of that paper. He was not cross-examined. Held, first, that secondary evidence of the contents of the copy was properly admitted; secondly, that there was evidence for the jury that the paper so sent to the institution was a copy of that which contained the libel; thirdly, that, though sent by a person unknown, it was evidence against the defendant, not to show malice, but to affect the damages, by showing the extent of circulation.[1] But where a defendant alleged, in mitigation, that a libellous book was published against him by plaintiff, and in support of such allegation a bookseller produced, from his own possession, a printed book, stating his belief that it is one of a number of copies published at his shop; held, that this was not evidence for the jury that another book with the same contents was actually published.[2]

§ 382. Where a person has admitted that he was the author of a libel in a certain newspaper, any other newspaper of the same impression may be read to the jury, and is not secondary evidence.[3] A newspaper may be read in evidence although not stamped.[4] To prove the publication of a libellous pamphlet, a witness testified that she received from the defendant a copy of a pamphlet,

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[1] Gathercole *v.* Miall, 15 M. & W. 319, 15 Law Jour. Rep. 179, Ex.; 10 Jurist, 337; 7 Law Times, 89.

[2] Watts *v.* Fraser, 7 Ad. & E. 223; 1 Mo. & Rob. 449; Moore *v.* Oastler, 1 Mo. & Rob. 451, n.

[3] McLaughlin *v.* Russell, 17 Ohio, 475; Woodburn *v.* Miller, Cheves, 194.

[4] Rex *v.* Pearce, Peake's Cas. 75; 1 Esp. 456.

of which she read some portions, and lent it to several persons in succession, who returned it to her, and although there was no mark by which she could identify it, she believed the copy produced to be the same, but could not swear that it was; held, that this was evidence of publication proper to be left to the jury.[1] Where several copies of a placard are printed, and a party adopts and uses some of the copies, all the rest are duplicate originals, and one of them may be read against such party, without notice to produce.[2] But placards in the windows of third persons, setting forth the forthcoming contents of the newspaper in which the libel was contained; held, inadmissible against the author, unless he were connected with the publication of them.[3] If the manuscript of a libel be proved to be in the handwriting of the defendant, and the libel be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to show that the printing and publication were by his direction.[4] And as handwritings may be compared, in an action for libel, if the testimony is corroborated from other sources,[5] papers in the handwriting of the defendant, found in the house of the editor of the newspaper in which the libel was published, were held admissible to prove the publication by the defendant.[6]

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[1] Fryer *v.* Gathercole, 18 Law Jour. 387, Ex.; 13 Jurist, 542; 13 Law Times, 285.

[2] Rex *v.* Watson, 2 Stark. Rep. 190. See Reg. *v.* Boucher, 1 Fost. & F. 486.

[3] Raikes *v.* Richards, 2 Car. & P. 562.

[4] Reg. *v.* Lovett, 9 Car. & P. 462.

[5] Cullan *v.* Gaylord, 3 Watts, 321; Waddington *v.* Cousins, 7 Car. & P. 595; see Rex *v.* Cator, 4 Esp. 117; Case of the Seven Bishops, 4 State Tr. 338.

[6] Tarpley *v.* Blabey, 2 Bing. N. S. 437; 2 Sc. 642; 7 Car. & P. 395; May *v.* Brown, 3 B. & Cr. 113; Finnerty *v.* Tipper, 2 Camp. 72; Wakley *v.* Johnson, 1 Ry. & M. 422; Stark. Sland. 429, 3 Ed. In an action for services in preparing reports for a newspaper, the authorship being in question, it is not competent to ask the opinion of a witness (founded merely on his having read the articles and professing a knowledge of the plaintiff's style of writing) as to whether the reports were written by the plaintiff. (Lee *v.* Bennett, How. Ct. of App. Cas. 202.)

§ 383. The defendant's liability as publisher may be proved by showing: a copy of the alleged libel in the defendant's handwriting,[1] addressed to the editor of a newspaper;[2] or by showing that defendant paid the printer or publisher of a newspaper for the insertion of the defamatory matter in the newspaper of such printer or publisher;[3] or by showing the defendant's admission of authorship.[4] Where the defendant admitted that he was the author of the alleged libel, *errors excepted*, held that the burden was on him to show that the errors were material.[5] The fact that the defendant made the publication to the witness under an injunction of secresy, is no objection to the proof of the publication by such witness.[6]

§ 384. The court and jury, and not the witnesses, are to construe the words.[7] And the opinion of witnesses as to the meaning of the language published is not admissible,[8]

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[1] McCombs *v.* Tuttle, 5 Blackf. 431.

[2] Bond *v.* Douglass, 7 C. & P. 626; and see Burdett *v.* Abbott, 5 Dowl. 201.

[3] Schenck *v.* Schenck, 1 Spencer, 208.

[4] Commonwealth *v.* Guild, Thatcher's Crim. Cas. 329; Rex *v.* Burdett, 4 B. & A. 717; The Seven Bishop's Case, 4 State Trials, 304. Where the letter containing the defamatory matter was sent sealed, and the writer afterwards stated, in the presence of several persons, that he had got W. to write the letter for him, and he had signed his own name to it, and kept a copy, and stated the contents of the letter, but without producing it, or a copy of it; *held*, that this was a publication of the libel (Adams *v.* Lawson, 17 Gratt. (Va.) 250.)

[5] Rex *v.* Hall, Str. 416.

[6] McGovern *v.* Manifee, 7 B. Monr. 314.

[7] Olmstead *v.* Miller, 1 Wend. 510. Where the imputation was that the plaintiff was a truck master, held that the term being composed of common English words, no evidence was necessary to explain its meaning, and that it was for the jury to say whether under all the circumstrnces the word was used in a defamatory sense. (Homer *v.* Taunton, 5 Hurl. & N. 661.) In Weed *v.* Bibbins, 32 Barb. 315, held that evidence of what was generally understood by "the Cunningham affair" was improperly admitted. And see Justice *v.* Kirlin, 17 Ind. 588; Watcher *v.* Quenzer, 29 N. Y. 552; Dedway *v.* Powell, 4 Ky. (Bush.) 77; and *ante*, ch. vii. and §§ 281, 286.

[8] Smart *v.* Blanchard, 42 N. Hamp. 137. Unless the words are ambignous, and their application doubtful, in which case the testimony of hearers as to how they understood the words is admissible. (*Id.*; and see Barton *v.* Holmes, 16 Iowa, 252;

and, therefore, a witness cannot be asked how he understood the words published,[1] nor be permitted to state what meaning he understood the defendant to convey by the words,[2] nor the *impression* produced on his mind by the whole of the conversation.[3] The words being *unambiguous*, it is not competent for a witness to say that he understood the publisher to mean differently from the common import of the words.[4] Where the language is *ambiguous* and it is doubtful in what sense the publisher intended it, the question is in what sense the hearers understood it, for "the slander and damage consist in the apprehension of the hearers."[5] The ordinary sense of the words is to be taken as the sense intended by the publisher unless the words are explained to import something different by other matter, connected therewith. Where it is first shown that something has occurred in consequence of which the words would convey a meaning different to their ordinary meaning, then the witness may be asked: What did you understand with reference to such an expression.[6] Where the charge was, "You (plaintiff) are a thief, a rogue, and a swindler," on not guilty pleaded, held, that the defendant could not prove circumstances not referred to and not known to the hear-

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Smith *v.* Miles, 15 Verm. 245.) In Leonard *v.* Allen, 11 Cush. 241, an action for slander, not by direct words, but by expressions, gestures, and intonations of voice, it was held competent for witnesses who heard the expressions to state what they understood the defendant to mean by them, and to whom he intended to apply them. In Nelson *v.* Borchenius, 52 Ill. 236, it held that in an action for slander the testimony of the hearers as to the sense in which they understood the words is admissible. But such testimony is not conclusive upon the jury. Such testimony is admissible as tending to show what meaning hearers of common understanding would and did ascribe to the words.

[1] Wright *v.* Paige, 36 Barb. 438.

[2] Snell *v.* Snow, 13 Mete. 278.

[3] Harrison *v.* Bevington, 8 Car. & P. 708.

[4] Potts *v.* Pace, 7 Jones' Law (N. Car.), 558.

[5] Fleetwood *v.* Curley, Hob. 267, *ante*, note 1, p. 177.

[6] Daines *v.* Hartley, 3 Ex. 200

ers at the time the charge was made in order to qualify the meaning of the terms used.[1] The plaintiff and defendant being present at a tavern where there had been a raffle, defendant said, "I am surprised at R. allowing a blackleg in this room." On the trial, a witness being asked what he understood by "blackleg," answered, "A person in the habit of cheating at cards." Held, by Pollock, C. B., and Watson, B., that the evidence was proper; and by Martin and Bramwell, BB., that it was not proper.[2] Nor can a witness be asked to whom he understood the defamatory matter to apply.[3] Where the libel consisted of a statement in a circular letter published by the secretary of a society for the protection of trade, that "a bill drawn and accepted by the plaintiff was made payable at a banker's where he had no account;" held, that as the letter stated a specific fact which required no explanation, a witness could not be asked what he understood by finding a person's name in such a paper; but the judge permitted the question whether such statement had any other meaning beyond that which was expressed on its face.[4]

§ 385. Material matter of inducement, if put in issue, must be proved.[5] Immaterial matter of inducement may be rejected as surplusage and need not be proved. Material matter of inducement if not put in issue is taken as

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[1] Martin *v.* Loei, 2 Fost. & F. 654.

[2] Barnett *v.* Allen, 3 Hurl. & Nor. 376; 1 Fost. & Fin. 235. Jury told to consider if words had conveyed meaning of a person who had gambled so as to be liable to a criminal prosecution. (*Id.*) Slander for the words "you are a *bunter*," on the trial plaintiff was asked what the word *bunter* meant, it was objected that as there was no innuendo and the word was not actionable *per se*, nor indeed had any meaning, the question of its acquired meaning could not be gone into, and by the court, that is so, there being no innuendo. (Rawlings *v.* Norbury, 1 Fost. & F. 341.)

[3] Rangler *v.* Himmell, 37 Penn. St. R. 130; Eastwood *v.* Holmes, 1 Fost. & F. 347. Held that a witness may say who is meant by the libel. (Smalley *v.* Stark, 9 Ind. 386.) See *ante*, § 97, p. 165, n., and n. 1, p. 177.

[4] Humphreys *v.* Miller, 4 C. & P. 7.

[5] "It is still necessary under the plea of not guilty to prove the colloquium." Cook on Defam. 145.

admitted.[1] No proof of it is necessary, and no evidence respecting it is admissible. Matter of inducement is not put in issue by a plea of not guilty.[2] Matter of inducement may be proved by parol.[3] When the words are actionable only by reason of their relation to extrinsic facts, such facts must be proved; as where the words were charged as spoken of a constable, imputing misconduct in the execution of a bench warrant, the words not being actionable in themselves, it was held that the warrant must be proven.[4] Where the alleged libel was concerning the sale by plaintiff of certain leaden figures called "Pilgrims' signs," held, the plaintiff must prove the objects referred to were "commonly called Pilgrims' signs."[5] And in an action for a libel on a constable alleged to have been published concerning his conduct in the apprehension of persons engaged in stealing a dead body, it was averred what that conduct had been, and it was alleged that plaintiff had carried the body to Surgeons' Hall, held that the plaintiff must prove the inducement.[6] In an action against the editor of a newspaper for a libellous publication, it is admissible for the plaintiff to show articles in subsequent numbers of the same paper, for the purpose of proving that the plaintiff was the person intended to be defamed.[7]

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[1] Fradley *v.* Fradley, 8 Car. & P. 572; Heming *v.* Power, 10 M. & W. 567; Gwynne *v.* Sharpe, 1 Car. & Mar. 532.

[2] Gwynne *v.* Sharpe, 1 Car. & M. 532.

[3] Southwick *v.* Stevens, 10 Johns. 443.

[4] Kinney *v.* Nash, 3 N. Y. 177. Under a declaration setting out the substance of the words spoken as a charge of stealing the plaintiff may prove that the words spoken, although not actionable in themselves, were rendered actionable by reason of certain extrinsic facts, by their referring to these facts, and by the manner in which they were used, although the declaration contains no averment that they were spoken with reference to any fact whatever. (Allen *v.* Perkins, 17 Pick. 369; Pond *v.* Hartwell, *id.* 269.)

[5] Eastwood *v.* Holmes, 1 Fost. & F. 347.

[6] Teesdale *v.* Clement, 1 Chit. R. 603; but this decision arose out of the peculiar form of the declaration.

[7] White *v.* Sayward, 33 Maine, 322.

§ 386. Pursuant to a rule already referred to (§ 315), the defamatory matter, so far as it goes, is evidence of the introductory averments.[1] Thus for words spoken respecting the plaintiff's trade; if the words assume that, at the time they were spoken, the plaintiff was engaged in such trade, there is no need of proving that fact.[2] Where it was to be plainly inferred, from the general tenor of the libel, that it was the object of the writer to represent the plaintiff as holding a situation of trust and confidence, and that he had abused it, held that it was sufficient to sustain the allegation in the declaration of plaintiff's holding such situation.[3] A declaration in libel stated as inducement that the plaintiff was a surgeon and member of the College of Surgeons, which said college had the power of expelling persons guilty of unprofessional conduct, and of unprofessionally advertising themselves and their cures. The libel was alleged to be published of and concerning the plaintiff as such surgeon, and of and concerning the

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[1] Rutherford *v.* Evans, 6 Bing. 451. In this case the plaintiff declared in respect of a libel upon him as "Surveyor of the New England Company;" held sufficient for him to prove employment by a company generally known by that name.

[2] Hesler *v.* Degant, 3 Ind. 501; Rodebaugh *v.* Hollingsworth, 6 Ind. 339; Berryman *v.* Wise, 4 T. R. 366. Where, in an action for a libel against the plaintiff, a medical practitioner, of and concerning him in his said practice, no evidence was offered of the plaintiff being of any regular degree, the libel stating him to be a quack, and that certain persons had the misfortune to come within his doctrinal prescriptions; held, that if the jury considered that the libel spoke of him as a medical practitioner, the case was not withdrawn from their consideration, although they might not give the same damages as to a person proved to be a regular practitioner. (Long *v.* Chubb, 5 C. & P. 55.) Where the declaration alleged that there were such states as C. and B., that the plaintiff and one H. had been appointed minister plenipotentiary and Consul General respectively from those states to this country, the libel on the face of it admitted that there were such states; and it being proved at the trial that the plaintiff had been appointed such officer for the one state, and H. for the other, held that the allegations were sufficiently made out. (Yrissari *v.* Clements, 3 Bing. 432.)

[3] Bagnall *v.* Underwood, 11 Price, 621. In an action for a libel the defendant pleaded justification, and in his plea introduced certain passages from a pamphlet written by plaintiff, upon which plea issue was joined. Held, that this was not so far an adoption of the whole pamphlet as true, as to enable the plaintiff to read other passages from it, to show that the defendant was the aggressor in the controversy which led to its publication. (Kearney *v.* Gough, 5 Gill & Johns. 457.)

said college and its said power. One of the libels complained of contained a statement that the college had the power of expelling its members. The second plea was that the plaintiff was not a surgeon and member of the College of Surgeons having the power of expelling persons guilty of unprofessional conduct, and of unprofessionally advertising themselves and their cures. Held, that the traverse put in issue the power of the college to expel, and that the statement in the libel itself was not sufficient evidence of such power.[1]

§ 387. It is a much vexed question whether in an action for slander or libel the plaintiff may, in aggravation of the damage he has sustained, introduce evidence of his good reputation prior to the publication complained of; on this point, as upon all the others relating to the proceedings in an action, we can do no more than call attention to the decisions upon the subject. Although it may be true that in an action for slander or libel the reputation of the plaintiff is in issue, it is nevertheless true that, as a general rule, the reputation of the plaintiff is assumed to be good until the contrary is shown (§§ 313, 314); and that, unless some blot upon the plaintiff's reputation is set up as a mitigating circumstance, or his reputation is otherwise assailed, he is not permitted for any purpose to introduce any evidence on the subject; thus it has been held that evidence cannot be given of the fairness of the plaintiff's character (reputation), even where a justification is pleaded, unless attacked by the defendant.[2] But held, also, that where the general issue

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[1] Wakley *v.* Healey, 18 Law Jour. Rep. 426, Ex.; 13 Law Times, 259; 4 Ex. 53.

[2] Shipman *v.* Burrows, 1 Hall, 399; Harcourt *v.* Harrison, 1 Hall, 474; Cornwall *v.* Richardson, 1 Ry. & M. 305; 1 C. & Y. 106; Severance *v.* Hilton, 4 Foster, 147; McGee *v.* Sodusky, 5 J. J. Marsh. 185; Inman *v.* Foster, 8 Wend. 602; Dame *v.* Kenney, 5 Fost. 318; Petrie *v.* Rose, 5 Watts & Serg 364; Holley *v.* Burgess, 9 Ala. 728; Harbison *v.* Shoak, 41 Ill. 142; Wright *v.* Shroeder, 2 Curtis, C. C. 548; Martin *v.* Hooker, 7 Coldw. (Tenn.) 130; Chubb *v.* Gsell, 34 Penn. St. R. 114; Miles *v.* Van Horn, 17 Ind. 245; Harris *v.* Wilson, 28 Ind. 296; and see Rhodes *v.* James, 7

only is pleaded, the plaintiff may give evidence of his good character.[1] In slander for the charge of perjury, where the plaintiff is permitted to give evidence of his character to protect himself, it is error to confine him to evidence of his general character for truth and veracity.[2] A witness called by the plaintiff in an action of slander, in support of the plaintiff's general character, stated that some persons spoke very ill and some very well of him. Held, that the plaintiff might ask the witness in what particulars some people spoke against him.[3]

§ 388. Where the language is actionable and the publication does not appear to be on any occasion which renders it privileged, there the language is presumed to be false and malicious, *i. e.*, published without lawful excuse.[4]

Ala. 574; Rector *v.* Smith, 11 Iowa, 302; Tibbs *v.* Brown, 2 Grant's Cases (Penn.) 39; Fleetcraft *v.* Jenks, 3 Whart. 158; McCabe *v.* Platter, 6 Blackf. 405; contra, Scott *v.* Pebbles, 2 Sm. & M. 546; Byrket *v.* Monohon, 7 Blackf. 83; Adams *v.* Lawson, 17 Gratt. 250; Shroyer *v.* Miller, 3 W. Vir. 158; Romayne *v.* Duane, 3 Wash. C. C. 246. It is not competent for the plaintiff to make proof of his good character, in reply to evidence of the truth of the charge. (Houghtaling *v.* Kilderhouse, 1 N. Y. 530; affirming 2 Barb. 149; Matthews *v.* Huntley, 9 N. Hamp. 146; Springstein *v.* Field, Anthon, 185; Her *v.* Cromer, Wright, 441; Stow *v.* Converse, 3 Conn. 325.) Where the charge is such that the defendant's evidence in justification, though insufficient to prove it, has a tendency to affect the general character of plaintiff, on the subject of the charge, he may reply by evidence of general good character in that particular. (Wright *v.* Shroeder, 2 Curtis, C. C. 548.)

[1] Williams *v.* Greenwade, 3 Dana, 432; King *v.* Waring, 5 Esp. Cas. 14; Bennett *v.* Hyde, 6 Conn. 24; Romayne *v.* Duane, 3 Wash. C. C. 246; Sample *v.* Wynn, Busbee Law (N. Car.) 319; Howell *v.* Howell, 10 Ired. 82; Burton *v.* March, 6 Jones, Law (N. Car.) 409.

[2] Steinman *v.* McWilliams, 6 Barr, 170.

[3] Leonard *v.* Allen, 11 Cush. 241.

[4] Fry *v.* Bennett, 5 Sandf. 54; Estes *v.* Antrobus, 1 Miss. 197; McKee *v.* Ingalls 4 Scam. 30; Parke *v.* Blackiston, 3 Harring. 373; Kinney *v.* Hosea, *Id.* 397; Farley *v.* Ranck, 3 Watts & Serg, 554; Erwin *v.* Sumrow, 1 Hawks, 472; Dexter *v.* Spear, 4 Mason, 115; Bodwell *v.* Osgood, 3 Pick. 379; Weaver *v.* Hendrick, 30 Miss. (9 Jones) 502; Roberts *v.* Camden, 9 East, 93; Usher *v.* Severance, 2 App. 9; Yates *v.* Reed, 4 Blackf. 463; Gilmer *v.* Ewbank, 13 Ill. 271; Root *v.* King, 7 Cow. 613; affirmed, 4 Wend. 113; Trabue *v.* Mayo, 3 Dana, 138; Byrket *v.* Monohon, 7 Blackf. 83; Hudson *v.* Garner, 22 Miss. (1 Jones) 423; Curtis *v.* Massey, 6 Gray, 261. The jury cannot infer the want of malice from the fact that the words were spoken only once, and stated as a common report. (Mason *v.* Mason, 4 N. Hamp. 110.)

But where the publication is *prima facie* privileged, the onus of proving malice in fact, *i. e.*, that the defendant was actuated by motives of personal spite or ill-will, is upon the plaintiff. The existence or non-existence of this intent is a question for the jury.[1] "The want of proof on the part of the defendant that the slander was true, is not enough (to prove malice), and the plaintiff, to maintain his action, must show that the charge was false, before he can ask the jury to find the slander to be malicious."[2]

§ 389. It is said that falsehood *may* be evidence of malice.[3] But the mere falsity of a publication, without its being shown that the publisher knew it to be false, is not *per se* evidence of malice. Thus, where the alleged libel was a complaint made by the defendant of the incompetency of the plaintiff, a surveyor, who had been

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[1] Pattison *v.* Jones, 8 B. & C. 578; 3 M. & R. 101; Bromage *v.* Prosser, 4 B. & C. 247; 6 Dow. & R. 296; Child *v.* Affleck, 9 B. & C. 403; Kelly *v.* Partington, 4 B. & Ad. 700; 3 N. & M. 116; Toogood *v.* Spyring, 4 Tyrw. 582; 1 C. M. & R. 573; Kine *v.* Sewell, 3 M. & W. 297; Wright *v.* Woodgate, 2 C. M. & R. 573; Tyrw. & G. 12; Liddle *v.* Hodges, 2 Bosw. 537; Somerville *v.* Hawkins, 10 C. B. 583; 15 Jurist, 450. The question of malice is for the jury to determine, upon all the facts and conversations in connection with which the words were spoken. (McKee *v.* Ingalls, 4 Scam. 30; Erwin *v.* Sumrow, 1 Hawks, 472; Smith *v.* Youmans, Riley, 88; Robinson *v.* May, 2 Smith, 3; Roberts *v.* Camden, 9 East, 93; Coleman *v.* Playstead, 36 Barb. 26.) Where the charge was that the conduct of plaintiff was "most disgraceful and dishonest." The conduct of plaintiff was of an equivocal nature, and might *bona fide* be supposed by defendant to be such as he described it, held, not of itself, evidence of malice, and the court did right to order a verdict for the defendant. (Spill *v.* Maule, Law Rep. IV. 232, Ex.) Where there is evidence from which the jury may find that the defendant knew the charge to be untrue, the defendant must disprove malice. The knowledge of its untruth is some evidence of malice. (Hartwell *v.* Vesey, 3 Law Times, N. S. 275.) In judging of the malicious character of an alleged libel, the jury may take into consideration the whole publication; and if it contains statements concerning other persons, which are malicious, the jury may infer therefrom, that what is said of the plaintiff is also malicious. (Miller *v.* Butler, 6 Cush. 71, and see Caddy *v.* Barlow, 1 M. & R. 275.)

[2] Fowles *v.* Bowen, 30 N. Y. 26; and see Edwards *v.* Chandler, 14 Mich. 471; Rogers *v.* Clifton, 3 B. & P. 587.

[3] Fairman *v.* Ives, 5 B. & Ald. 645. Where part of a defamatory publication is shown to be true, the falsehood of the other part may be left to the jury as evidence of malice. (Blagg. *v.* Sturt, 10 Q. B. 897; 8 Law Times, 135.)

sent to him for employment, and the *innuendo* charged that the defendant meant that the plaintiff was not a competent and skilful surveyor, held, that evidence of the general competency and abilities of the plaintiff was inadmissible to show malice.[1] Making a statement which is untrue to the knowledge of the party making it, is evidence of malice.[2] On the trial of an action for slander, the plaintiff's witnesses proved that the slanderous statements were untrue in fact, but also that they were the natural and reasonable inferences from what took place, and which they professed to describe, and that the defendant was present at the occurrence which the slanderous statements referred to. The judge ruled that the occasion was privileged, but that the plaintiff must have a verdict unless the defendant proved that the statements were made without malice. Held, a right direction; the presence of the defendant being some evidence that the statements were made with a knowledge that they were untrue.[3] To show that the defendant knew of the falsity of a charge of theft published by him, the plaintiff was permitted to prove that after the time when the theft was alleged to have been committed by plaintiff, the defendant continued upon friendly terms with plaintiff.[4]

§ 390. The plaintiff may prove in aggravation of the damages, his rank and condition in society,[5] malice (ill-will)

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[1] Brine *v.* Bazalgette, 18 Law Jour. Rep. 348, Ex.; Caulfield *v.* Whitworth, 18 Law Times, N. S. 527.

[2] Fountain *v.* Boodle, 2 Gale & D. 455; 5 Q. B. 5; Harris *v.* Thompson, 13 C. P. 333; Sexton *v.* Brock, 15 Ark. 345; Farley *v.* Ranck, 3 Watts & Serg. 554.

[3] Hartwell *v.* Vesey, 9 C. B., N. S. 882; 3 Law Times, N. S. 275. In slander, with general issue only pleaded, the plaintiff cannot, in the first instance, give evidence tending to prove the defendant's knowledge of the falsity of the words spoken. (Hartrauft *v.* Hesser, 34 Penn. St. R. 117.)

[4] Burton *v.* March, 6 Jones Law (N. Car.) 409.

[5] Tillotson *v.* Cheetham, 3 Johns. 56; Hosley *v.* Brooks, 20 Ill. 115; Larned *v.* Buffington, 3 Mass. 546; Bodwell *v.* Swan, 3 Pick. 376; Howe *v.* Perry, 15 Pick. 506; Smith *v.* Lovelace, 1 Duvall (Ky.) 215; Justice *v.* Kerlin, 17 Ind. 588; Peltier *v.* Mict, 50 Ill. 511; *contra*, see Gandy *v.* Humphries, 35 Ala. 617.

in defendant (§ 392, *post*), that defendant knew the charge to be false,[1] other publications of words *not actionable*,[2] or which are actionable,[3] if, as is said, the right of action on such words is barred by the statute of limitations.[4] Subsequent defamatory remarks upon the plaintiff[5] and after the commencement of the action.[6] In slander of a physician in his profession, the currency of the slanderous report in the place of his practice, following the utterance of the same by the defendant, may be given in evidence, as well as the effect of such report upon the professional gains of the plaintiff, in aggravation of damages, without strict proof connecting the current report with the slander of

[1] Bullock *v.* Cloyes, 4 Verm. 304; Stow *v.* Converse, 3 Conn. 325; *ante*, § 389.

[2] Allensworth *v.* Coleman, 5 Dana, 315. Slanderous words, not laid in the declaration, cannot be proved in aggravation of damages. (Vincent *v.* Dixon, 5 Ind. (Porter), 270; Schenck *v.* Schenck, 1 Spencer, 208; Botelar *v.* Bell, 1 Md. 173; Medaugh *v.* Wright, 27 Ind. 137.)

[3] Lee *v.* Huson, Peake, 166; Bond *v.* Douglass, 7 C. & P. 626; but see Cook *v.* Field, 3 Esp. 133.

[4] Titus *v.* Sumner, 44 N. Y. 266; Breckett *v.* Davis, 21 Pick. 404; Throgmorton *v.* Davis, 4 Blackf. 174. But words not laid in the declaration cannot be proved to make the words laid actionable. (Jones *v.* Jones, 1 Jones Law (N. Car.) 495.) And where words actionable in themselves, and not set out in the declaration, are admitted in evidence to prove malice, the court must caution the jury that they are not to increase the damages on account of such words. (Letton *v.* Young, 2 Met. (Ky.) 558; Barrett *v.* Long, 8 Ir. Law Rep. 331; Scott *v.* McKinnish, 15 Ala. 662; Burson *v.* Edwards, 1 Carter (Ind.) 164.)

[5] Chubb *v.* Westley, 6 C. & P. 436; *post*, § 394. Where the words complained of are unambiguous, held, that proof of the publication subsequently of other words of the same import, is inadmissible. (Pearce *v.* Ormsby, 1 M. & Rob. 455; Symmons *v.* Blake, *Id.* 447.)

[6] *Post*, § 395; Barwell *v.* Adkins, 2 Sc. N. S. 11; Hesler *v.* Degant, 3 Ind. 501; Williams *v.* Harrison, 3 Miss. 411; Hutch *v.* Potter, 2 Gilman, 75; Kean *v.* McLaughlin,, 2 S. & R. 469; *contra*, McGlenery *v.* Keller, 3 Blackf. 488.

In an action for a libel in a weekly periodical publication, a witness was allowed to prove a purchase of a copy after the action brought. (Plunkett *v.* Cobbet, 2 Selw. N. P. 1042; 2 Esp. 136.) If a defendant, after action brought, issues a new publication, mingling the matter for which he has been sued with new libellous matter, he cannot call upon the court to analyze the publication, and separate what refers to the former libel from the new slanderous matters it may contain, but the whole may be read in evidence. (Schenck *v.* Schenck, 1 Spencer, 208.) As to proof of repetition of the slander not being admissible to aggravate the damages, see Burson *v.* Edwards, 1 Carter (Ind.) 164; Shortley *v.* Miller, 1 Smith, 395; Lanter *v.* McEwen, 8 Blackf. 495; Forbes *v.* Myers, *Id.* 74.

the defendant; the fact of such connection being for the jury, and not for the court to pass upon.[1] A libel charged M. with kidnapping a free colored man, and referred to two numbers of a newspaper which showed the transaction *in full; Held*, an aggravation of the libel.[2] If the publication was in a newspaper, the plaintiff may, to aggravate the damages, prove the extent of the circulation of that paper at the time of the publication of the alleged libellous matter, and to prove this, may give a copy of the defendant's paper in evidence containing a statement of the amount of circulation.[3]

§ 391. The plaintiff, to aggravate damages, cannot prove the defendant's wealth,[4] nor that it was currently reported that defendant had charged the plaintiff with the crime mentioned in the declaration,[5] nor that the plaintiff had suffered distress of mind.[6]

§ 392. The plaintiff may prove express malice—*i. e.*, ill-will or hostility on the part of the defendant towards the plaintiff—either to aggravate the damages[7] or to de-

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[1] Rice *v.* Cottrell, 5 R. I. 340. In Hotchkiss *v.* Lothrop, 1 Johns. 286; Dole *v.* Lyon, 10 Johns. 447, doubted if defendant being indemnified was not admissible in aggravation. *Semble* not, as indemnity void. *Ante*, § 305.

[2] Nash *v.* Benedict, 25 Wend. 645.

[3] Fry *v.* Bennett, 28 N. Y. 330.

[4] Myers *v.* Malcolm, 6 Hill, 292; Ware *v.* Curtledge, 24 Ala. 622; Palmer *v.* Haskins, 28 Barb. 90; Morris *v.* Barker, 4 Harring. 520; but see Fry *v.* Bennett, 4 Duer, 247; Bennett *v.* Hyde, 6 Conn. 24; Case *v.* Marks, 20 Conn. 248; Adcock *v.* Marsh, 8 Ired. 360; Karney *v.* Paisley, 13 Iowa (5 With.) 89; Humphries *v.* Parker, 52 Maine, 502; Hosley *v.* Brooks, 20 Ill. 115; Harbison *v.* Shook, 41 Ill. 142; Lewis *v.* Chapman, 19 Barb. 252; Kunkel *v.* Markell, 26 Md. 391.

[5] Leonard *v.* Allen, 11 Cush. (Mass.) 241.

[6] Terwilliger *v.* Wands, 17 N. Y. 54; Wilson *v.* Goit, *Id.* 442; *contra*, Swift *v.* Dickerman, 31 Conn. 285; *ante*, note, p. 97.

[7] Fry *v.* Bennett, 28 N. Y. 330; True *v.* Plumley, 36 Maine (1 Heath), 466; Sawyer *v.* Hopkins, 9 Shep. 268; Jellison *v.* Goodwin, 43 Maine, 287; 2 Greenl. Ev. § 418; Spilling *v.* Carson, 27 Md. 175. Proof of malice in Connecticut. (Moore *v.* Stevenson, 27 Conn. 14.) Until some of the actionable words laid have been proved, evidence of the *quo animo* of the defendant is inadmissible. (Abrams *v.* Smith, 8 Blackf. 95.)

feat a defense of privileged publication.[1] To establish such malice, the plaintiff may, it is held, in some cases, give in evidence other publications by the defendant of defamatory language concerning the plaintiff, whether it be the same as or other than the language declared upon, if of the like import.[2] But the better opinion appears to be, that evidence of a charge of a *different nature*, and at a different time from that alleged in the declaration, is inadmissible to prove malice or for any purpose.[3] This is in effect only another form of the rule that actionable words not counted upon cannot be given in evidence,[4] unless a suit upon them is barred by the statute of lim-

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[1] Baboneau *v.* Farrell, 15 C. B. 360; 24 Law Jour. Rep. N. S. 9, C. P.; 1 Jur. N. S. 14; Littlejohn *v.* Greeley, 13 Abb. Pra. Rep. 41; Suydam *v.* Moffat, 1 Sandf. 459; Root *v.* King, 4 Wend. 113; Garrett *v.* Dickerson, 19 Md. 418; see Holt *v.* Parsons, 23 Texas, 9. It is no objection to a recovery for the slanderous words charged, that the publication of the same words has been proved against the defendant in a former action between the same parties, for the purpose of proving malice. (Swift *v.* Dickerman, 31 Conn. 285; Campbell *v.* Butts, 3 N. Y. 173.)

[2] Burson *v.* Edwards, 1 Carter (Ind.) 164; Pearson *v.* Le Maitre, 6 Sc. N. S. 607; 5 Man. & G. 700; Delegal *v.* Highley, 8 C. & P. 444; Elliott *v.* Boyles, 31 Penn. St. R. 65; The State *v.* Jeandell, 5 Harring. 475; Price *v.* Wall, 2 Quart. Law Jour. 63; Cavanagh *v.* Austin, 42 Verm. 576; Johnson *v.* Brown, 57 Barb. 118. Proof may be given of the publication of other words of like import. (Thompson *v.* Bowers, 1 Doug. 321; Stearns *v.* Cox, 17 Ohio, 590; Taylor *v.* Moran, 4 Metc. (Ky.) 127.) Extracts from a newspaper, being separate and independent libels not declared on, may be offered in evidence to prove express malice, or as showing the *quo animo;* such words cannot be made the foundation of a recovery of damages for an injury the plaintiff may have suffered from them, but can only affect the damages by showing the degree of malice. (Van Derveer *v.* Sutphin, 5 Ohio (N. S.) 293; Markham *v.* Russell, 12 Allen (Mass.) 573.)

[3] Howard *v.* Sexton, 4 N. Y. 157. Although in slander, the plaintiff, to prove the *animus*, may show a repetition of the words, or of such as show the same train of thought, yet he cannot give in evidence other words which may be the subject of another action; held, also, that it appearing that the plaintiff had recovered in another action against the defendant's son, what passed after the verdict, by way of proposal to, compromise the second action, was admissible to show that it was not vexatiously prosecuted. (Deffries *v.* Davies, 7 C. & P. 112.)

[4] Rundell *v.* Butler, 7 Barb. 260; Mead *v.* Daubigny, Peake, 125; and see Campbell *v.* Butts, 3 N. Y. 173; Keenholts *v.* Becker, 3 Denio, 346; Thomas *v.* Croswell, 7 Johns. 264; *contra*, Duvall *v.* Griffith, 2 Har. & Gil. 30; Scott *v.* McKinnish, 15 Ala. 662; Long *v.* Chubb, 5 C. & P. 55; Barton *v.* Brand, 3 Green, 248; Brittain *v.* Allen, 2 Dev. 120; 3 Dev. 167.

itations,[1] and their admission, where the statute has run, is opposed to principle, as it in effect restores a cause of action which has been taken away by the law.[2] It seems clear that a repetition by the defendant of the defamatory matter complained of is admissible to prove malice in fact; and it is said that within this rule any act or language of the defendant tending to show malice beyond that implied by the original publication, the subject of the action, may be proved.[3]

§ 393. In an action for libel, the defendant pleaded the general issue, and also a plea under the 6th and 7th Vict. c. 96, denying actual malice, and stating an apology. On the trial, the plaintiff, in order to prove malice, tendered in evidence other publications of the defendant, going back above six years before the publication complained of, held, that these publications were admissible in evidence;[4] but the court should, in such a case call attention to the distance of time elapsed before the subsequent statements, and that those statements might have referred to some other and subsequent matter, so as not to show malice at the time of the publication complained of.[5]

§ 394. A plaintiff may, to prove malice, give evidence

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[1] Inman *v.* Foster, 8 Wend. 602; Throgmorton *v.* Davis, 4 Blackf. 174; Flamingham *v.* Boucher, Wright, 746; see, also, Lincoln *v.* Chrisman, 10 Leigh, 338. In an action of slander for words imputing perjury, an affidavit of the defendant, on which an indictment had been preferred, and which had been made so long before as to be barred by the statute of limitations, charging the plaintiff with the same perjury set out in the declaration, is admissible in evidence, as proof of the repetition of the same words in a different form, and with more deliberation, and to show the *quo animo*. (Randall *v*, Holsenbake, 3 Hill (S. Car.) 175.)

[2] Root *v.* Lowndes, 6 Hill, 518.

[3] Fry *v.* Bennett, 28 N. Y. 328; Johnson *v.* Brown, 57 Barb. 118. Damages recovered for previous slander may be given in evidence to show malice. (Symmons *v.* Blake, 1 M. & Rob. 477.)

[4] Barrett *v.* Long, 3 Ho. of Lords Cas. 395; 8 Ir. Law Rep. 331.

[5] Hemmings *v.* Gasson, 36 Law Jour. Rep. 252, Q. B.; 1 El. B. & E. 346.

of a publication by the defendant made subsequently to the publication declared upon, when the subsequent publication is of a like import with that declared upon, or relating thereto, or is not actionable of itself, or explains any ambiguity in the matter declared upon.[1] And in an action for words imputing perjury, the plaintiff was allowed, for the purpose of showing the *quo animo*, to give in evidence an indictment subsequently preferred by the defendant against him, and which was ignored.[2] But in an action of slander, for charging the plaintiff with stealing two beds, it was held not competent for the plaintiff, for the purpose of showing malice, to prove that the defendant subsequently entered a complaint against him, before a magistrate, for stealing a lot of wood and old iron; first, because the words used in the complaint did not relate to the charge which was the subject of the action; and secondly, because such using of the words was a proceeding in a course of justice, before a magistrate having jurisdiction of the supposed offense.[3]

§ 395. The plaintiff may, it seems, to prove malice, give evidence of defamatory publications by the defendant concerning him *after* the commencement of the action; but the authorities are conflicting.[4] In general, what occurs after the commencement of the action is inadmissible;

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[1] Pearce *v.* Ormsby, 1 M. & Rob. 455; Mix *v.* Woodward, 12 Conn. 262; Williams *v.* Miner, 18 *Id.* 464; Symmons *v.* Blake, 1 M. & Rob. 477; Baldwin *v.* Soule, 6 Gray, 321; Shock *v.* McChesney, 2 Yeates, 473; Smith *v.* Wyman, 4 Shep. 13; Howard *v.* Sexton, 4 N. Y. 157; Kendall *v.* Stone, 2 Sandf. 269; Kennedy *v.* Gifford, 19 Wend. 296; Miller *v.* Kerr, 2 McCord, 285; Pearson *v.* LeMaitre, 6 Sc. N. S. 607; 5 Man. & G. 700; Chubb *v.* Westley, 6 C. & P. 436; Shrimper *v.* Heilman, 24 Iowa, 505; Robbins *v.* Fletcher, 101 Mass. 115.

[2] Tate *v.* Humphrey, 2 Camp. 73, n.

[3] Watson *v.* Moore, 2 Cush. 133.

[4] *Ante*, note 6, p. 601; Howell *v.* Cheatem, Cooke, 247; Scott *v.* Montsinger, 2 Blackf. 454; Teagle *v.* Deboy, 8 Blackf. 134; Warne *v.* Chadwell, 2 Stark. 457. Slanderous words, spoken since the suit was commenced, are admissible in evidence to show the sense in which the words laid were spoken. (Carter *v.* M'Dowell, Wright, 100; and M'Donald *v.* Murchison, 1 Dev. 7.)

but where the words published led to the arrest of the plaintiff after the commencement of his action, it was held that the defendant might have excluded all evidence of what took place after the commencement of the action, but having consented to its admission, the jury were at liberty to take it into consideration.[1]

§ 396. Where evidence of another or other publications than that declared upon is or are admitted for the purpose of showing malice only, the jury should be instructed that it is admitted for that purpose alone, and that they are not to give damages for other than the words charged in the declaration.[2] An instruction was given to the jury to the effect that a letter written by defendant and given in evidence by the plaintiff, was admissible only to show malice, and for no other purpose, and that they had a right to award such damages to plaintiffs as they thought them entitled to under all the circumstances proved in the case; held, that the caution to the jury in respect to the effect of the letter was not sufficient.[3]

§ 397. Evidence tending to make out an admission by the defendant, subsequently to the speaking of the words, of a dispute existing between him and the plaintiff before the speaking of the words, about a sum of money claimed to be due from the defendant to the plaintiff, is admissible to show express malice.[4] So to prove malice plaintiff may give evidence tending to show that defendant coveted the possession of plaintiff's land, and hoped by defaming him to compel him to remove;[5] but he cannot show that defendant had, by promises of reward and threats of

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[1] Goslin *v.* Corry, 8 Sc. N. S. 21; 7 Man. & G. 343.

[2] Scott *v.* McKinnish, 15 Ala. 662; Barrett *v.* Long, 8 Ir. Law Rep. 331.

[3] Letton *v.* Young, 2 Metc. (Ky.) 558.

[4] Simpson *v.* Robinson, 18 Law Jour. Rep. 73, Q. B.; 13 Jur. 187.

[5] Morgan *v.* Livingston, 2 Rich. 573,

vengeance, endeavored to prevent the attendance of witnesses for plaintiff.[1]

§ 398. In an action of slander for charging an infant with larceny, evidence of a previous quarrel between the defendant and the plaintiff's father and next friend, is inadmissible to prove malice in the defendant towards the plaintiff.[2] In an action against the *publisher* of the magazine in which the libel was published, evidence of personal malice of the editor against the plaintiff was held inadmissible.[3] So the refusal of the editor of a newspaper to publish a retraction of the libel was held not to be evidence of malice against the publisher of such newspaper.[4] On the trial of an action for a libel in a newspaper, it appeared that the defendant employed F. to print the newspaper in question, and that S., one of F.'s workmen, had *set up* the article in the absence of the defendant and of the editor of the paper, held that the plaintiff could not ask a witness if he heard S. express any ill-will towards the plaintiff.[5] In the same case, it was held that the plaintiff might give in evidence an article published in a subsequent number of the same newspaper, with the defendant's knowledge and consent, justifying the publication of the article complained of as libellous, though such article was not published until after the action was commenced.

§ 399. The language itself whether oral or written, may be evidence of malice, and where the occasion renders the publication *prima facie* privileged, the jury may take the language into consideration to determine the intent with which the publication was made.[6]

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[1] Kirkaldie *v.* Paige, 17 Verm. 256.

[2] York *v.* Pease, 2 Gray, 282.

[3] Robertson *v.* Wylde, 2 M. & Rob. 101.

[4] Edsall *v.* Brooks, 2 Robertson, 414; 33 How. Pra. Rep. 191.

[5] Goodrich *v.* Stone, 11 Metc. 486.

[6] Wright *v.* Woodgate, 2 C. M. & R. 573; Tyrw. & G. 12; Gilpin *v.* Fowler, 9

§ 400. Interposing a justification which the defendant either abandons or fails to prove, may be regarded as an aggravation of the original wrong, and may be taken into consideration by the jury in estimating damages.[1] It is evidence of malice,[2] and of continued malice.[3] A justification on the ground of truth was held not be an aggravation of the charge, where the defendant had reason to believe the charge to be true,[4] or where the plea of truth was so defective that no judgment could have been entered

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Ex. 615; Cooke *v.* Wildes, 5 El. & Bl. 328; Jackson *v.* Hopperton, 16 Com. B. N. S. 829; Spill *v.* Maule, Law Rep. IV. Ex. 232; *ante* § 288, and last clause of § 241, also Swadling *v.* Tarpley, in Appendix *post.* Expressions in excess of what the occasion requires do not constitute malice, but are merely evidence of malice. (Buckley *v.* Kiernan, 7 Ir. C. L. 75; Sutton *v.* Plumridge. 16 Law Times, N. S. 741; Liddle *v.* Hodges, 3 Bosw. 537; 18 N. Y. 48; Howard *v.* Sexton, 4 N. Y. 161; Fero *v.* Ruscoe, *Id.* 162; Garrett *v.* Dickerson, 19 Md. 418; Hotchkiss *v.* Porter, 30 Conn. 414; White *v.* Nicholls, 3 How. U. S. Rep. 266; The case of Tuson *v.* Evans, 12 Adol. & El. 733, said to be overruled.)

[1] Fero *v.* Ruscoe, 4 N. Y. 162; Wilson *v.* Robinson, 14 Law Jour. Rep. 196, Q. B.; 9 Jurist, 726; Lee *v.* Robertson, 1 Stew. 138; Richardson *v.* Roberts, 23 Geo. 215; Pool *v.* Devers, 30 Ala. 672; Updegrove *v.* Zimmerman, 13 Penn. St. R. (1 Harris), 619; Gorman *v.* Sutton, 32 *Id.* 247; Doss *v.* Jones, 5 How. (Miss.), 158; Robinson *v.* Drummond, 24 Ala. 74; Beasley *v.* Meigs, 16 Ill. 139; Spencer *v.* McMaster, *Id.* 405; Smith *v.* Wyman, 4 Shep. 13; *contra,* Murphy *v.* Stout, 1 Smith, 256; Shortley *v.* Miller, *Id.* 395; Shank *v.* Case, 1 Carter (Ind.), 170: Millison *v.* Sutton, *Id.* 508; Starr *v.* Harrington, *Id.* 515; and see Swails *v.* Butcher, 2 Carter, 84; Sloan *v.* Petrie, 15 Ill. 425; Thomas *v.* Dunaway, 30 Ill. 373; Rayner *v.* Kinney, 14 Ohio, N. S. 283; Pallet *v.* Sargent. 36 N. Hamp. 496; Cavanagh *v.* Austin, 42 Verm. 576.

The judge, in addressing the jury, commented upon the fact that the defendant had refused, at the trial, to make an apology and withdraw his justification, though he gave no evidence in support of it, as evidence of malice. Held no misdirection. (Simpson *v.* Robinson, 11 Law Times, 266; 18 Law Jour. Rep. 73, Q. B.; 13 Jur. 187.) That the defendant procured evidence to prove the truth of his charges, and then declined to plead in justification, may be properly referred to the jury on the question of malice, though not on that of damages. (Bodwell *v.* Osgood. 3 Pick. 379.) The defendant endeavoring to obtain testimony of the truth of the alleged defamatory matter, is not of itself evidence of malice. (Ormsby *v.* Douglass, 37 N. Y. 482.) Nor is the fact of pleading a justification, of itself, evidence of malice. (Caulfield *v.* Whitworth, 18 Law Times, N. S. 527.) Efforts of defendant to have plaintiff indicted, may be shown to aggravate damages. (Harbison *v.* Shook, 41 Ill. 142.)

[2] Jackson *v.* Stetson, 15 Mass. 48; Alderman *v.* French, 1 Pick. 1.

[3] Wilson *v.* Nations, 5 Yerg. 211.

[4] Byrket *v.* Monohon, 7 Blackf. 83; and see Shortley *v.* Miller, 1 Smith, 395.

upon it,[1] or where the plea was withdrawn before the trial.[2] Where in an action for libel defendant pleaded not guilty and a justification; he offered no proof of the justification, but gave evidence to show that the publication was made under circumstances rendering it a privileged communication; held, that the jury, in forming their opinion (upon the first issue, whether or not the communication was privileged), ought not to take into consideration the fact that the justification had been pleaded and abandoned..[3]

§ 401. In an action for a libel, the defendant, to justify a charge made by him against the plaintiff of unfairness and partiality as collector of the United States taxes, proved that the plaintiff had refused to receive bills of a certain bank in payment of a tax. To rebut this evidence, the plaintiff offered a letter of instructions to him from the commissioner of the revenue, designating the description of the bills which the plaintiff should receive. It was held that such evidence was admissible as negativing the charge of unfairness and partiality in the plaintiff's conduct.[4] It was in the same case held that the plaintiff could not repel a charge of partial and unjust conduct, in the exaction of commissions not authorized by law, by showing that such commissions were taken honestly, through a mistaken construction of the law.

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[1] Braden *v.* Walker, 8 Humph. 34.

[2] Gilmore *v.* Borders, 2 How. (Miss.), 824.

[3] Wilson *v.* Robinson, 7 Q. B. 68; 9 Jurist, 726; 14 Law Jour. N. S. 196, Q. B.

[4] Stow *v.* Converse, 3 Conn. 325.

CHAPTER XVII.

EVIDENCE FOR DEFENDANT.

What evidence is admissible depends upon what plea or answer is interposed—What may be proved under the general issue—Evidence to support a justification—Plaintiff's reputation in issue—Inquiry limited to plaintiff's general reputation—And to his reputation prior to the publication complained of—Truth in mitigation—Conduct of plaintiff leading to belief in truth—Report or suspicion of plaintiff's guilt in mitigation—Plaintiff's standing and condition in society—Prior or subsequent declarations of defendant—Heat and passion—Previous publications by the plaintiff—Controversies between plaintiff and defendant prior to the publication—Circumstances not admissible in mitigation.

§ 402. What evidence the defendant may give depends upon what plea or answer he has interposed.[1] His proof

[1] We have already (note p. 120, *ante*) referred to some decisions on the proof of intent, we here add some others which have come to our knowledge since the previous note was written. In Smith *v.* Higgins, 82 Mass. (16 Gray) 251, it is said: In slander the good faith of the defendant and the feelings which prompted him to speak the words alleged in the declaration, being properly in issue, he is competent to testify concerning them. The testimony of the defendant concerning his motive in speaking the words, his belief in their truth, and the absence of ill-will or malice towards the plaintiff is admissible. In White *v.* Tyrrell, 5 Ir. L. R. N. S. 477, the defendant having written a letter, was permitted to be asked the question whether in writing the letter he had the intention of provoking a challenge. In Cortland Co. *v.* Herkimer Co., 44 N. Y. 22, the defendant as a witness was allowed to answer the question, "Did you send (the pauper) from the County of Herkimer, in good faith?" In Cowdrey *v.* Coit, 44 N. Y. 382, held not proper to ask a witness: What would you have done with the proceeds if you had effected a sale? In Dillon *v.* Anderson, 43 N. Y. 236, the action was on contract, defense, that contract was made jointly with H. who was not made a party. The contract was in writing and signed by defendant. H. was named in the body of the paper as a contracting party, but it was not signed

must correspond with his plea. Under the common law system of pleading and procedure, many matters of defense might be given in evidence under the general issue which now require to be specially pleaded. So, too, under the common law system, mitigating circumstances could not be pleaded, but were admitted in evidence under the general issue; and this is still the rule where there is not any statutory provision on the subject. In New York and some other States, provision is made by statute allowing the defendant, in actions for slander and libel, to set forth in his answer the mitigating circumstances he will prove upon the trial. Some of the effects of these statutory provisions have already been referred to under the head of Pleading; other effects will be noticed hereafter.

§ 403. Under the general issue the defendant was at

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by him; on the trial, the defendant was called as a witness on his own behalf and asked by his counsel, "Did you intend to make an individual contract?" The question was disallowed, and held in the court of appeals. "The testimony called for was not proper. There are authorities that a witness may be asked his motive or intent in doing an act. * * We think that they hold no more than this; that where the doing the act is not disputed, but is affirmed, and whether the act shall be valid or invalid, hangs upon the intent with which it was done, which intent from its nature would be formed and held without avowal, then he upon whom the intent is charged may testify whether he secretly held such intent when he did the act. Thus an insolvent assignor in trust, charged with the fraudulent intent to hinder and delay creditors, may be called in support of the deed of trust, and may say, whether, when he made it, he had no fraudulent purpose; and one sued for a malicious prosecution, may testify that in setting on foot the legal proceedings he believed that there was cause for them. And as an extreme case which we are not willing to extend, one against whom the defense of usury has been set up, has been permitted to testify what was the intention in stipulating for a sum reserved out of the face of a note. But that an act should be held to have or not to have effect, and one party to it to be bound or not, as the other party to it should, by his undisclosed purpose, have determined, is warranted by no sound principle." In Robbins *v.* Fletcher, (101 Mass.) 115. An action of slander for accusing plaintiff of fornication, defendant having denied, in his testimony in chief, that he spoke the words alleged, or that he had any ill-will toward the plaintiff, may be asked on cross-examination whether he did not, before the time when it was contended that he uttered the words sued on, have a hostile feeling toward a person whom there is evidence that he spoke of as the other party to the offense.

liberty to prove anything which destroyed the plaintiff's cause of action;[1] he might disprove the fact of publication, or show that the matter published was not of an injurious character, or that the publication was privileged;[2] as being a fair comment on a matter of public concern;[3] any circumstances which tended to disprove malice;[4] or that plaintiff procured the publication with a view to an action;[5] and where the libel consisted of a report of proceedings the publication of which was not privileged,

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[1] Barber *v.* Dixon, 1 Wils. 45; and see O'Donoghue *v.* McGovern, 23 Wend. 26. Where the words clearly impute a felony, if the defendant do not justify, he cannot show that the words related to an act which might have been innocent. (Laine *v.* Wells, 7 Wend. 175.)

[2] O'Brien *v.* Clements, 15 Law Jour. Rep. 285, Ex.; 3 D. & L. 676. Where the defense is privileged communication, it need not be specially pleaded. (Lillia *v.* Price, 1 Nev. & P. 16; 5 Dowl. 432; Richards *v.* Boulton, 4 Up. Can. Q. B. Rep. O. S. 95; Abrams *v.* Smith, 8 Blackf. 95.) But it may be specially pleaded, (Dunn *v.* Winters, 2 Humph. 512) and it seems it must be pleaded in Massachusetts. (Goodwin *v.* Daniels, 7 Allen (Mass.), 61.) In New York it must be pleaded. In England, in actions of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being in the profession or trade alleged. (Reg. Gen. H. T., 4 Will. 4; 2 C. & M. 23; 10 Bing. 477; 3 Nev. & M. 9; 5 B. & Adol. ix.) All matters in confession and avoidance shall be specially pleaded. (*Ib.*)

[3] Lucan *v.* Smith, 20 Jur. 1170.

[4] Weaver *v.* Hendrick, 30 Mis. (9 Jones) 502; Smith *v.* Smith, 39 Penn. St. R. 441; Sims *v.* Kinder, 1 Carr. 279; Van Deusen *v.* Sutphin, 5 Ohio, N. S. 293; Swift *v.* Dickerman, 31 Conn. 285; Williams *v.* Miner, 18 Conn. 464; Thomas *v.* Dunaway, 30 Ill. 373; Brunswick *v.* Pepper, 2 C. & K. 683; Remington *v.* Congdon, 2 Pick. 310; Gilman *v.* Lowell, 8 Wend. 573. And in New York under a general denial and a proper statement in the answer, any circumstance to disprove malice may be shown, although it tended to prove the truth of the charge. (Bush *v.* Prosser, 11 N. Y. 347; Bisbey *v.* Shaw, 12 N. Y. 67; Dolevin *v.* Wilder, 34 How. Pra. Rep. 488.) Where there is any, the slightest doubt in the mind of the judge as to whether the facts set up in mitigation tend to disprove malice, he should permit them to be proved, and submit the question of malice to the jury. (*Id.*)

[5] See *ante*, note 3, p. 150. In an action for slander, plea the general issue. *Held*, proper to refuse to charge "that if the defendant did no more than repeat a report which originated from the plaintiff's levity and carelessness, the plaintiff could not recover." (Fitzgerald *v.* Stewart, 53 Penns. 343; see apparently *contra*, Shirley *v.* Keatly, 4 Cold. (Tenn.) 29.) Plaintiff's motive in bringing the action is immaterial to the issue on a plea of justification. (Bradley *v.* Kennedy, 2 Greene, (Iowa) 231.)

it was held that it might be shown under the general issue and in mitigation that the report, although not correct, was an honest one, and intended to be a fair account of the transaction referred to.[1] The general issue put in issue, the malice in making the publication,[2] and amounted to a denial of the special damage,[3] and the general good reputation of the plaintiff (§ 406), but it admitted the inducement[4] and the falsity of the charge.[5] The defenses of accord and satisfaction, former recovery, truth and illegality of plaintiff's occupation, must be specially pleaded (§§ 250, 251, 354, 183, 409), to enable the defendant to give evidence of them on the trial.

§ 404. As to the proof of a justification, it is held that, in an action for slander or libel, the charge complained of being the commission of a criminal offense, the same degree of evidence is necessary to sustain a plea of justification as would be necessary to convict the plaintiff in a criminal prosecution for the same offense.[6] At least the defendant must prove the crime charged to the satisfaction of the jury,[7] and beyond a reasonable doubt.[8]

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[1] Smith *v.* Scott, 2 Car. & K. 580; and see East *v.* Chapman, 1 Mo. & Malk. 46; Charlton *v.* Watson, 6 C. & P. 385.

[2] Keegan *v.* Robson, 6 Up. Can, Q. B. 375.

[3] Wilby *v.* Elston, 8 C. B. 142. A traverse of special damage held unnecessary and improper. (Smith *v.* Thomas, 2 Bing. N. C. 372; see Perring *v.* Harris, 2 Moo. & Rob. 5; Custis *v.* Sandford, 4 Ir. C. L. 197.)

[4] Fradley *v.* Fradley, 8 C. & P. 572; Power *v.* Heming, 10 M. & W. 564; Gwynne *v.* Sharpe, 1 C. & Mar. 533.

[5] Sheahan *v.* Collins, 20 Ill. 325.

[6] Landis *v.* Shanklin, 1 Carter (Ind.) 92; Shoulty *v.* Miller, *Ib.* 554; Gants *v.* Vinard, *Ib.* 476; Newbit *v.* Statuck, 35 Maine (5 Red.) 315; Dwinell *v.* Aiken, 2 Tyler, 75; Seely *v.* Blair, Wright, 683; Steinman *v.* McWilliams, 6 Barr, 170; Willett *v.* Harmer, 8 C. & P. 695; Swails *v.* Butcher, 2 Carter (Ind.) 84; Woodbeck *v.* Keller, 6 Cowen, 118; Forshee *v.* Abrams, 2 Clarke (Iowa,) 571; *contra*, Barfield *v.* Britt, 2 Jones' L. (N. Car.) 41; Gorman *v.* Sutton, 32 Penns. 247; Sauter *v.* McEwen, 8 Blackf. 495; Wonderly *v.* Nokes, 8 Blackf. 589; Folsom *v.* Brawn, 5 Foster (N. Hamp.) 114; Kincade *v.* Bradshaw, 3 Hawks, 63.

[7] Offutt *v.* Earlywine, 4 Blackf. 460. Evidence of plaintiff's being suspected is not sufficient. (Commons *v.* Walters, 1 Porter, 323; Knight *v.* Foster, 39 N. H. 576.)

[8] Shortly *v.* Miller, 1 Smith, 395.

The plea must be substantially proved,[1] or the plaintiff is entitled to recover.[2] Where the charge is crime, a conviction of the plaintiff of the crime is, in general, admissible to sustain a justification, but it is only *prima facie* evidence, and must be excluded if the defendant was a witness in the criminal prosecution.[3] A plea of justification of libel, that the plaintiff had been guilty of bigamy, requires as strong proof as on an indictment for that offense; but a plea justifying a charge of polygamy, held sustained by proof of actual marriage in two instances, and of cohabitation and reputation as to a third.[4] To sustain a plea of justification of a charge of perjury, the testimony of two witnesses at least, or of one witness and strong corroborating circumstances, are necessary.[5] And the defendant must prove not only that the plaintiff's testimony was false, but that it was wilfully and corruptly false.[6] The corrupt intent, however, is inferable from the falsity of the testimony.[7] To establish the justification, the testimony which the plaintiff gave on the trial when the alleged perjury was committed, may be received as evidence to be considered by the jury.[8] Under an allega-

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[1] Napier *v.* Daniell, 3 Sc. 417; 2 Hodges, 187; 3 Bing. N. C. 77; Forrest *v.* Hanson, 1 Cr. C. C. 63.

[2] Kincade *v.* Bradshaw, 3 Hawks, 63.

[3] Maybee *v.* Avery, 18 Johns. 352. This was at the time when parties could not be witnesses in their own behalf in civil actions. Where they can be such witnesses, probably the exception stated in the text does not apply.

[4] Willett *v.* Harmer. 8 C. & P. 695.

[5] Bradley *v.* Kennedy, 2 Greene (Iowa) 231; Steinman *v.* McWilliams, 6 Barr, 170; Byrket *v.* Monohon, 7 Blackf. 83; Woodbeck *v.* Keller, 6 Cowen, 118; Newbit *v.* Statuck, 35 Maine (5 Red.) 31; Dwinells *v.* Aiken, 2 Tyler, 75. This rule was somewhat qualified in Kincade *v.* Bradshaw, 3 Hawks, 63; Spruil *v.* Cooper, 16 Ala. 791. See 3 Phillips' Ev., Cowen & Hill's and Edwards' notes, tit. in index Slander.

[6] McKinly *v.* Robb, 20 Johns. 351. That is to say he must prove technical perjury. (Hicks *v.* Rising, 24 Ill. 566; McGlenary *v.* Keller, 3 Blackf. 488; Gorton *v.* Keeler, 51 Barb. 475; *contra*, Wood *v.* Southwick, 97 Mass. 354.)

[7] Hopkins *v.* Smith, 3 Barb. 599.

[8] Newbit *v.* Statuck, 35 Maine (5 Red.) 315; Arrington *v.* Jones, 9 Port. 139. In an action of slander, for charging the plaintiff with perjury in a judicial proceeding,

tion in the libel that the defendant had crushed the Hygeist system of wholesale poisoning, and that several vendors had been convicted of manslaughter, held, that it was not necessary for the defendant to prove that the system had been entirely crushed, and that proof of the conviction of two vendors for manslaughter sufficiently proved the plea, although the evidence as to the death being occasioned by not complying with the printed regulations in some respects varied from the allegation, there being evidence for the jury as to the cause of death.[1]

§ 405. Where the words laid charge the plaintiff with having committed a certain offense, evidence will not be received that he committed a different offense, neither with the same or with other persons.[2] As where the plaintiff was charged with adultery with J. S., it was held that proof of adultery with others than J. S. could not be received.[3] Where the plaintiff was charged with keeping a house of ill-fame, it was held that evidence of unchaste and lascivious conduct of the plaintiff's family, not establishing the offense was inadmissible for any purpose.[4] And where the charge was of perjury on a certain occasion, held that defendant could not justify by proof of

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the defendant, on the plea of "not guilty," may prove what the words sworn by the plaintiff were, in mitigation of damages. (Grant *v.* Hover, 6 Munf. 13.)

[1] Morrison *v.* Harmer, 3 Bing. N. C. 755; 4 Scott, 524.

[2] Pallet *v.* Sargeant, 36 N. H. 496; Sharpe *v.* Stevenson, 12 Ired. 348; Barthelemy *v.* The People, 2 Hill, 257. Under a plea of justification for charging plaintiff with fornication with a certain man, evidence that her child is a bastard is not sufficient. (Richardson *v.* Roberts, 23 Geo. 215.) Where the words charged the stealing of D.'s hay, and the defendant offered evidence to prove that the hay, the subject of the theft so charged, was the joint property of the plaintiff and D., so that in legal effect no such crime was or could have been committed, it was held, that as the charge was unequivocally a charge of theft, so intended and so received, the evidence offered by the defendant was inadmissible. (Williams *v.* Miner, 18 Conn. 464.)

[3] Matthews *v.* Davis, 4 Bibb, 173; and see Walters *v.* Smoot, 11 Ired. 315.

[4] Bush *v.* Prosser, 13 Barb. 221. On trial for words imputing unchastity to plaintiff, it is not permissible, under a plea of not guilty, to prove that the house in which the plaintiff resided was a house of ill-fame. (Hackett *v.* Brown, 2 Heiskell (Tenn.) 264.)

perjury on any other occasion than that alleged.[1] To a charge that plaintiff had had connexion with a mare, innuendo been guilty of the crime against nature with a beast, defendant gave notice that he would prove on the trial that plaintiff had had connexion with a *cow*, and on the trial offered to prove the allegation in his notice, the court refused to receive it, either in bar or in mitigation, on the ground that it was not a justification of the specific charge laid, but of another charge distinct as to the subject-matter.[2] A libel charging hardness towards the poor, dissoluteness of morals, and habits of vice and calumny, as conclusions deducible from particular instances enumerated and arranged in it, cannot be supported by proof of other instances of conduct, not detailed or alluded to in it.[3]

§ 406. The plea of not guilty put in issue the general character (reputation)[4] of the plaintiff, and therefore upon a plea of not guilty only, the defendant might give in evidence in mitigation the general bad character (reputation) of the plaintiff, *before and at the time* of the publication complained of. "Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence."[5] This "principle so much

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[1] Aldrich *v.* Brown, 11 Wend. 596; Whitaker *v.* Carter, 4 Ired. 461. But where the charge was larceny, held that defendant might offer evidence to prove a particular larceny of the same description as that charged. (Adams *v.* Ward, 1 Stew. 42.)

[2] Andrews *v.* Vanduzer, 11 Johns. 38.

[3] Barthelemy *v.* The People, 2 Hill, 248.

[4] As to the difference between reputation and character see *ante*, note, p. 80. Character is conduct, it is independent of reputation. Character must be true, while reputation may be false. (Seely *v.* Blair, Wright (Ohio,) 683.)

[5] L'd Ellenborough, in —— *v.* Moore, 1 M. & S. 284. In Bracegirdle *v.* Bailey, 1 Fost. & F. 536, there was no plea of justification, plaintiff was put on the witness stand but not examined in chief, held that defendant could not, to mitigate damages, put questions to plaintiff tending to discredit him nor which went to show his bad character.

discussed at an early day and for a time left unsettled, has since been so well established by authority as not now to be open for discussion;[1] and such evidence was also admissible where the defendant, in addition to not guilty, put in a plea of justification, and gave evidence to support it but failed to establish it.[2] Whether in New York such evidence would be admissible under a general denial and without any circumstances in mitigation set up in the answer, does not appear to have been decided in any reported case. In our opinion, to entitle a defend-

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[1] Jewett, J., Hamer *v.* McFarlin, 4 Denio, 509, citing Foot *v.* Tracy, 1 Johns. 46; Springstein *v.* Field, Anthon's N. P. 185; Paddock *v.* Salisbury, 2 Cow. 811; Douglass *v.* Tousey, 2 Wend. 352; Root *v.* King, 7 Cow. 613; S. C. in error, 4 Wend. 113; Richardson *v.* Northrup, 56 Barb. 105; and see Gilman *v.* Lowell, 8 Wend. 573; Scott *v.* McKinnish, 15 Ala. 662; Pope *v.* Welsh, 18 Ala. 631; Fuller *v.* Dean, 31 Ala. 654; Anthony *v.* Stephens, 1 Miss. 254; Bryan *v.* Gurr, 27 Geo. 378; Eastland *v.* Caldwell, 2 Bibb, 21; Bowditch *v.* Peckham, 1 Chip. 145; Bridgman *v.* Hopkins, 34 Verm. 532; Lamos *v.* Snell, 6 N. Hamp. 413; Sawyer *v.* Eifert, 2 N. & M. 511; Seymour *v.* Morrill, 1 Root, 459; Vick *v.* Whitfield, 2 Ham. 222; De Witt *v.* Greenfield, 5 Ham. 225; Brunson *v.* Lynde, 1 Root, 354; Wolcott *v.* Hull, 6 Mass. 514; Alderman *v.* French, 1 Pick. 1; Parkhurst *v.* Ketchum, 6 Allen, 406; Buford *v.* McLuniff, 1 N. & M. 268; Henry *v.* Norwood, 4 Watts, 347; Young *v.* Bennett, 4 Scam. 43; Sanders *v.* Johnson, 6 Blackf. 50; McCabe *v.* Platter, 6 Blackf. 405; Burke *v.* Miller, 6 Blackf. 155; Steinman *v.* McWilliams, 6 Barr, 170; McNutt *v.* Young, 8 Leigh, 542; Stone *v.* Varney, 7 Metc. 86; Bowen *v.* Hall, 12 Metc. 232; Sheahan *v.* Collins, 20 Ill. 325; Bell *v.* Parke, 11 Irish Law Rep. 485. As to the rule in England, see Jones *v.* Stevens, 11 Price, 235, where it is said, it is not competent to a defendant to plead a justification, as of plaintiff's general bad character, in general and indefinite terms, but he is bound to state facts specially to give the plaintiff an opportunity of denying them; such pleas are demurrable; and it is an abuse of the court to put them on record; neither can he any more be permitted to give particular or general evidence of that nature in mitigation of damages, than to plead it in bar of the action. See Morris *v.* Langdale, 2 B. & P. 284. Evidence of general bad reputation of plaintiff was rejected, there being no plea of justification. Edgar *v.* Newell, 24 Up. Can. Q. B. Rep. 215; Myers *v.* Curry, 22 *Id.* 470) In an action for slander for charging the plaintiff, a female, with want of chastity, the judge directed the jury "that if they should find that plaintiff had so destroyed her character by her own lewd and dissolute conduct as to have sustained no injury from the words spoken, they might give only nominal damages." (Flint *v.* Clark, 13 Conn. 361; and see Conroe *v.* Conroe, 47 Penn. St. R. 198.)

[2] Hamer *v.* McFarlin, 4 Denio, 509. It was held otherwise in Jackson *v.* Stetson, 15 Mass. 48, and that case was followed in Alderman *v.* French, 1 Pick. 1. But Jackson *v.* Stetson was questioned in Cilley *v.* Jenness, 2 N. Hamp. 89; Whitaker *v.* Freeman, 1 Dev. 280; and see Stone *v.* Varney, 7 Metc. 86; 2 Stark. Ev. 878; and the cases cited in the last preceding note.

ant in the courts of New York to question the general character of the plaintiff, he should state in his answer his intention to give such evidence on the trial.[1]

§ 407. When an inquiry into the reputation of the plaintiff is permissible, it is his general reputation taken as a whole, and not his reputation as to any particular act or in any particular transaction, that is to be inquired of;[2] and, therefore, evidence cannot be given of his guilt of any specific act of misconduct;[3] as that he had been guilty of false-swearing.[4] Where the charge was that the plaintiff, a physician, had no professional knowledge or skill, and lost almost all his patients, it was held that proof of particular instances in which the plaintiff had shown want of knowledge and skill, for the purpose of mitigating damages, was inadmissible.[5] And although it has been said that when a defendant may give evidence of the general bad reputation of the plaintiff, he is not confined to the subject-matter of the defamation complained of,[6] yet in an action for charging the plaintiff with perjury, it was held erroneous to admit evidence of his

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[1] Anon., 8 How. Pra. Rep. 434; and see Stiles *v.* Comstock, 9 *Id.* 48.

[2] Steinman *v.* McWilliams, 6 Barr, 170; Spilling *v.* Curson, 27 Md. 175; Wright *v.* Shroeder, 2 Curt. 548; Fitzgerald *v.* Stewart, 53 Penns. 343; Lambert *v.* Pharis, 3 Head (Tenn.) 622; Fountain *v.* West, 23 Iowa, 9.

[3] Andrews *v.* Van Deuser, 11 Johns. 38; Vick *v.* Whitfield, 2 Ham. 222; Dewitt *v.* Greenfield, 5 Ham. 225; Lamos *v.* Snell, 6 N. Hamp. 413; Sawyer *v.* Eifert, 2 N. & M. 511; Burke *v.* Miller, 6 Blackf. 155; Freeman *v.* Price, 2 Bailey, 115; Ridley *v.* Perry, 4 Shep. 21; Matthews *v.* Davis, 4 Bibb, 173; Brown *v.* Hall, 12 Met. 232; Parkhurst *v.* Ketchum, 6 Allen, 406.

[4] Luther *v.* Skeen, 8 Jones' Law (N. Car.) 356.

[5] Swift *v.* Dickerman, 31 Conn. 285. And such evidence would not be admissible for the purpose of showing the professional reputation of the plaintiff, as reputation can only be proved by the direct testimony of those who are acquainted with it, and not by particular facts. (*Id.*)

[6] Sayre *v.* Sayre, 1 Dutcher, 235; Lamos *v.* Snell, 6 N. Hamp. 413; Sawyer *v.* Eifert, 2 N. & M. 511; see, however, Wright *v.* Shroeder, 2 Curtis, C. C. 548. The inquiry should be confined to the plaintiff's general character for integrity and moral worth, or to conduct similar in character to that with which he was charged by the defendant. (Leonard *v.* Allen, 11 Cush. 241.)

general bad character for truth.[1] And where the charge as proven was of burning a jail and murdering a man in it, but there was some evidence that it was only of aiding an escape from the jail, held, that the evidence that the defendant was reputed guilty of the latter offense, was inadmissible for any purpose.[2] The defendant imputed to the plaintiff, who was a clergyman, these words: "Mr. S. said the blood of Christ had nothing to do with our salvation, more than the blood of a hog." Held, that testimony tending to prove that the plaintiff denied the divinity of Christ and the doctrine of his atonement, and said he was a created being, a good man and perfect, his death that of a martyr, but that there was no more virtue in his blood than that of any creature, was not admissible, either in justification or mitigation.[3] In an action of slander for having called the plaintiff a thief, and saying that "he had stolen his (defendant's) spar," the defendant, in mitigation of damages, offered in evidence the record of a verdict and judgment in his favor against A., for having taken maliciously, and converted to his own use, the spar in question, it was held that such evidence was inadmissible.[4] And where the charge was that the plaintiff was a thief, and had stolen the defendant's corn, and the defendant justified, held that evidence that the parties were tenants in common of some corn, and that the defendant had taken secretly, unfairly, and dishonestly,

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[1] Steinman *v.* McWilliams, 6 Barr, 170. In an action for charging the plaintiff with perjury, the plaintiff proved the speaking of the words charged, and then asked the witness what was the plaintiff's general character, when on oath and when not on oath, as a man of truth. The witness answered the question favorably to the plaintiff. The defendant's counsel then, in cross-examining the witness, asked him what was the plaintiff's general moral character, and the plaintiff objected to the question. Held, that the question ought to be answered, because it was on cross-examination, and because the answer might furnish evidence in mitigation of damages. (Lincoln *v.* Chrisman, 10 Leigh, 338.)

[2] Cole *v.* Perry, 8 Cow. 214.

[3] Skinner *v.* Grant, 12 Verm. 456.

[4] Watson *v.* Churchill, 5 Day, 256.

more than his share, was not admissible either in justification or mitigation. Mistake, to mitigate, must be mistake of fact and not of law.[1]

§ 408. The rule in relation to proof of the character of the plaintiff is, that the inquiry must be made as to his general reputation where he is best known, and the witness ought ordinarily to come from his neighborhood. But what the extent of such neighborhood is, and what credit is to be given to witnesses near and remote, are questions for the jury in determining the general character of the person in question.[2] One who went to the place of the plaintiff's former residence to learn her character while there, is not competent to prove it; nor if plaintiff kept boarders at the time of the slander, is evidence of their opinion admissible; nor can one testify who knows nothing about the plaintiff's reputation but what he heard from witnesses at a prior circuit.[3] A jury, in estimating character, are to take the testimony of witnesses who are supposed to be able or capable of reflecting, in general terms, the judgment of the public.[4] Proof of the bad reputation of the plaintiff, although of a kind that could not have been caused by the slander, must be of his reputation prior to or at the time of the publication complained of.[5] His bad reputation subse-

[1] Bisbey *v.* Shaw, 15 Barb. 578.

[2] Powers *v.* Presgroves, 38 Miss. 227. The reputation of the plaintiff, among the minority of his neighbors, is inadmissible. (*Id.*; and see Swift *v.* Dickerman, 31 Conn. 285.) In an action for accusing the plaintiff of unchasteness, where a witness deposes that the plaintiff's character for chastity is bad, it is not necessary that the witness should first have been asked whether he knows the plaintiff's general character for chastity. (Senter *v.* Carr, 15 N. Hamp. 351.) A witness who has stated that the plaintiff's character for moral worth is bad, may be asked, on cross-examination, what immorality is imputed to him. (Leonard *v.* Allen, 11 Cush. 241.)

[3] Douglas *v.* Tousey, 2 Wend. 352.

[4] Luther *v.* Skeen, 8 Jones' Law (N. Car.), 356.

[5] Douglass *v.* Tousey, 2 Wend. 252. Where the charge was of general unchastity, it was held that under the general issue the general bad reputation of the plaintiff might be shown in mitigation. (Conroe *v.* Conroe, 47 Penns. 198.)

quent to the publication complained of, may have been the effect of such publication.

§ 409. The defense of truth must be specially pleaded. The defendant cannot, under the general issue, prove the truth of the publication complained of.[1] But if the plaintiff give in evidence parts of the publication not set forth in the declaration, the defendant may, under the general issue, justify such parts.[2] The proof of the repetition by the defendant of the words complained of, after the commencement of the action, will not confer upon the defendant the right under the general issue to give evidence of the truth of the matter published.[3] And under the general issue the defendant cannot, even *in mitigation*, give evidence of any facts which conduce to prove the truth, or which form a link of evidence to that end.[4] The rule was that evidence in mitigation must be such as admitted the charge to be false.[5] And if a defendant failed to establish a plea of justification, he was not entitled to any benefit from the evidence given in support of such plea, and which *tended* to prove the truth of the charge.[6] Nor was a defendant allowed to prove in mitigation any

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[1] Beardsley *v.* Bridgeman, 17 Iowa, 290; Porter *v.* Botkins, 59 Penns. 484; McCampbell *v.* Thornburgh, 3 Head (Tenn.) 109; Shirley *v.* Keathy, 4 Cold. (Tenn.) 29; Barrows *v.* Carpenter, 1 Cliff. 204. *Semble*, that in slander of title, the rule is otherwise (Watson *v.* Reynolds, 1 M. & M. 1.) See § 354, *ante*.

[2] Henry *v.* Norwood, 4 Watts, 347; and see Woodburn *v.* Miller, Cheves, 194; Burke *v.* Miller, 6 Blackf. 155; Stow *v.* Converse, 4 Conn. 18; Wagner *v.* Holbrunner, 7 Gill. 296.

[3] Teagle *v.* Deboy, 8 Blackf. 134.

[4] Purple *v.* Horton, 13 Wend. 9; Scott *v.* McKinnish, 15 Ala. 662; Teagle *v.* Deboy, 8 Blackf. 134; Thompson *v.* Bowers, 1 Doug. 321; Swift *v.* Dickerman, 31 Conn. 285; Wagstaff *v.* Ashton, 1 Harring. 503; Grant *v.* Hover, 6 Mumf. 13; Henson *v.* Veatch, 1 Blackf. 369; Else *v.* Ferris, Anthon, 23; Gilman *v.* Lowell, 8 Wend. 573; and see Owen *v.* McKean, 14 Ill. 459; Williams *v.* Miner, 18 Conn. 464; McAlister *v.* Sibley, 25 Maine (12 Shep.) 474. Particular facts, which might form links in the chain of circumstantial evidence against the plaintiff, cannot be received under the general issue in mitigation of damages. (Wormouth *v.* Cramer, 3 Wend. 395.)

[5] Cooper *v.* Barber, 24 Wend. 105.

[6] Fero *v.* Ruscoe, 4 N. Y. 162.

circumstance which tended to prove the truth of the charge, although he expressly disavowed a justification, and admitted the falsity of the charge.[1] But he might prove in mitigation circumstances which induced him erroneously to make the charge complained of, and thereby rebut malice, *provided* the evidence did not necessarily imply the truth of the charge, or tend to prove it true.[2] A defendant justifying, and failing in his proof, may offer evidence in mitigation of damages,[3] if they are set up in his answer.[4] The Code of New York has so far modified these rules as to admit, in mitigation, circumstances which *tend* to prove the truth of the charge, and to give a defendant (who has claimed the right by his answer) the benefit of evidence in support of a plea or answer of justification, when such evidence falls short of proof, but nevertheless *tends* to prove the truth of the charge;[5] and to admit in mitigation anything which occasioned the

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[1] Petrie *v.* Rose, 5 Watts & Serg. 364; Watson *v.* Moore, 2 Cush. 133; Regnier *v.* Cabot, 2 Gilman, 34; Vesey *v.* Pike, 3 C. & P. 512.

[2] Minesinger *v.* Kerr, 9 Barr, 312; Spilling *v.* Carson, 27 Md. 175. Plaintiff was arrested for beating his wife, and taken before an alderman, defendant published an account of the arrest, held he might show the circumstances which induced the publication (Donnelly *v.* Swain, 2 Phila. Rep. 93.) Defendant may show in mitigation that he copied the matter complained against from the journals of Congress (Romayne *v.* Duane, 3 W. C. C. 246; *ante*, note p. 342.)

Held, in action against the publishers of a newspaper, that the defendants could not show that an article similar to that complained of had shortly before been published in another newspaper (Sheahan *v.* Collins, 20 Ill. 325.) In slander for saying, "Negro Jude said, &c., and it is reported everywhere," evidence that the negro did use the actionable words, held admissible in mitigation as showing defendant's motive (Williams *v.* Greenwade, 3 Dana, 432.) Where a defendant utters defamatory matter as on his own knowledge, evidence will not be received on the trial that the matter was communicated to him by another (Elliott *v.* Boyles, 31 Penns. 65.) The fact of the articles being copied from another paper, held a ground for giving only nominal damages (Davis *v.* Cutbush, 1 Fost. & F. 487.)

[3] Morehead *v.* Jones, 2 B. Munroe, 210; Landlis *v.* Shanklin, 1 Smith (Ind.) 78; West *v.* Walker, 2 Swann (Tenn.) 32; Thomas *v.* Dunaway, 30 Ill. 373; Pallett *v.* Sergent, 36 N. Hamp. 496; *contra*, Shelton *v.* Simmons, 12 Ala. 466.

[4] Russ *v.* Brooks, 4 E. D. Smith, 644.

[5] Bush *v.* Prosser, 11 N. Y. 347; Bisbey *v.* Shaw, 12 N. Y. 67. And so held in Michigan (Huson *v.* Dale, 19 Mich. 17.)

defendant, at the time of making the publication, to believe it to be true.[1]

§ 410. Whether or not the defendant may, in mitigation of damages, give evidence of improper conduct of the plaintiff calculated to invite the language complained against, and affording just ground to believe them true, seems doubtful. In one case, for words impugning the chastity of the plaintiff's wife, the defendant was permitted to prove, in mitigation of damages, that the plaintiff's wife and an unmarried man had lived together alone in one house.[2]

§ 411. It has been held in some cases that the defendant may, in mitigation of damages, prove that *prior* to the publication complained of, a general report or suspicion existed that the plaintiff had committed the act charged.[3]

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[1] Dolevin *v.* Wilder, 34 How. Pra. Rep. 488; Stanley *v.* Webb, 21 Barb. 148. As to the rule that the defendant might show in mitigation belief in the truth not amounting to the actual truth, see Williams *v.* Miner, 18 Conn. 464; Stees *v.* Kemble, 27 Penn. St. R. 112; Hutchinson *v.* Wheeler, 35 Verm. (6 Shaw) 330; Gilman *v.* Lowell, 8 Wend. 573; Gorton *v.* Keeler, 51 Barb. 475; Byrket *v.* Monohon, 7 Blackf. 83; Huson *v.* Dale, 19 Mich. 17.) Testimony offered by the defendant to show that the words charged were spoken with reference to a bill in chancery which he supposed was sworn to by the plaintiff, and did contain false allegations, but which he afterwards ascertained was sworn to by another, is inadmissible in mitigation of damages. (Owen *v.* McKean, 14 Ill. 459; but see Purple *v.* Horton, 13 Wend. 9; Van Derveer *v.* Sutphin, 5 Ohio, N. S. 293.) For the purpose of proving that the owner of a building which has been set on fire has reason to believe that a particular person was the incendiary, and used good faith in making statements charging him with the crime, evidence that he was informed of declarations and acts of the suspected person, tending to show his guilt, is competent. (Lawler *v.* Earle, 5 Allen (Mass.), 22.)

[2] Reynolds *v.* Tucker, 6 Ohio, N. S. 516; and see Bradley *v.* Heath, 12 Pick. 163; Haywood *v.* Foster, 16 Ohio, 88, Minesinger *v.* Kerr, 9 Barr, 312; Shoulty *v.* Miller, 1 Carter (Ind.), 544; but such evidence was rejected, although the defendant also proposed to show that at the time the words were uttered a public investigation was going on, involving an inquiry into the plaintiff's conduct, and was a subject of public remark. (Knight *v.* Foster, 39 N. H. 576; and see Regnier *v.* Cabot, 2 Gilman, 34.) Evidence of the defendant's suspicions on the subject is inadmissible. (Henson *v.* Veatch, 1 Blackf. 369.)

[3] Wetherbee *v.* Marsh, 20 N. Hamp. 561; Case *v.* Marks, 20 Conn. 248; Bridgman *v.* Hopkins, 34 Verm. (5 Shaw) 532; Van Derveer *v.* Sutphin, 5 Ohio, N. S. 393;

The decisions to the contrary are quite numerous.[1] What two or three persons had said in relation to plaintiff's character, was held inadmissible.[2] In case for slander, imputing gross ill-treatment by the plaintiff of a female; under the plea not guilty, the evidence of the plaintiff showing that the words were spoken in answer to an inquiry whether he had not imputed, &c., and inquiry by the plaintiff who was the author of the slander, the defendant replying that he had heard of the imputation, and that the report was current, and that he had reason to believe it true, but refused to give up the reporter, held that the defendant might show, by cross-examination, that such report had in fact prevailed, and was a topic of conversation before the uttering of the words by the defendant.[3] In an action for a libel, the defendant, to support a charge against the plaintiff of having set up and supported an infidel club, offered evidence that a club to which the plaintiff belonged had the general character of an infidel club. It was held that such evidence was not admissible, either to justify or mitigate the charge.[4]

Young *v.* Slemons, Wright, 124; Knobel *v.* Fuller, Peake Ad. Cas. 139; Cook *v.* Barkley, 1 Penn. N. J. Rep. 169; Smith *v.* Richardson, Bull. N. P. 9; Fuller *v.* Dean, 31 Ala. 654; Morris *v.* Barker, 4 Harring. 520; Springstein *v.* Field, Anthon, 185; Foot *v.* Tracy, 1 Johns. 45; Henson *v.* Veatch, 1 Blackf, 369; Commons *v.* Walters, 1 Port. 323; Fletcher *v.* Burroughs, 10 Iowa (2 With.), 557; and see Moyer *v.* Pine, 4 Mich. 409; Bradley *v.* Gibson, 9 Ala. 406; Sheehan *v.* Collins, 20 Ill. 325.

[1] Young *v.* Bennett, 4 Scam. 43; Sanders *v.* Johnson, 6 Blackf. 50; Fisher *v.* Pattison, 14 Ohio, 418; Scott *v.* M'Kinnish, 15 Ala. 662; Anthony *v.* Stephens, 10 Mis. 254; Haskins *v.* Lumsden, 10 Wis. 359; Beardsley *v.* Bridgman, 17 Iowa, 290; Alderman *v.* French, 1 Pick. 1; Bowen *v.* Hall, 12 Met. 232; Hancock *v.* Stephens, 11 Humph. 507; Skinner *ads.* Powers, 1 Wend. 451; Watkin *v.* Hall, 9 Best. & S. 279. In ——— *v.* Moor, 1 M. & S. 284, the defendant was permitted, on cross-examination of a witness for the plaintiff, to ask whether he had not heard reports of plaintiff being guilty of offenses similar to the offense charged. See Taylor on Evidence, 315, 2d edit., where the English authorities are collected, and are by the author said to preponderate in favor of the reception of the evidence of general suspicion in mitigation. And see Wolmer *v.* Latimer, 1 Jurist, 19.

[2] Regnier *v.* Cabot, 2 Gilman, 34.

[3] Richards *v.* Richards, 2 Mo. & Rob. 567.

[4] Stow *v.* Converse, 4 Conn. 17.

§ 412. The defendant may, in mitigation of damages, show the plaintiff's standing and condition in society.[1]

§ 413. The declaration of a defendant, made *prior* to the publication complained of, may be given in evidence to mitigate the damages; as where the defendant had employed a printer to print the libel complained of, it was held that he might, to show the absence of ill-will, and to mitigate damages, prove that at the time of the employment he instructed the printer to keep the matter as private as possible.[2] But declarations or acts of a defendant, made *subsequently* to the publication complained of, cannot be received in mitigation.[3] A full and unqualified retraction of the libel complained of, is admissible in mitigation.[4]

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[1] Larned *v.* Buffington, 3 Mass. 546; Bodwell *v.* Swan, 3 Pick. 376; Howe *v.* Perry, 15 Pick. 506. The Supreme Court of Pennsylvania held in an action of slander for charging perjury, evidence of plaintiff's general character for truth was admissible in mitigation. (1 Up. Can. Law Jour. N. S. 248.)

[2] Taylor *v.* Church, 8 N. Y. 452; and see Stallings *v.* Newman, 26 Ala. 300; Hagan *v.* Hendry, 18 Md. 177; Bond *v.* Douglass, 7 C. & P. 629; Vinners *v.* Serell, Id. 163; Inman *v.* Foster, 8 Wend. 602. An injunction of secrecy upon the person to whom the publication was made held not to be a defense. (McGowen *v.* Monifee, 7 Monr. 314.) It was held proper, on the trial of an indictment against the editor of a newspaper for libel, to ask a witness if at the time of the publication the defendant was not absent and knew nothing of the transaction. (Commonwealth *v.* Buckingham, Thacher's Crim. Cas. 29.)

[3] Scott *v.* McKinnish, 15 Ala. 662; Bradford *v.* Edwards, 32 Ala. 628. In Yeates *v.* Reed, 4 Blackf. 463, it was held that defendant's efforts to prevent the circulation of the libel complained of, was not receivable in mitigation. The defendant cannot, to support his plea of justification, give evidence of transactions or conversations between himself and others, to which the plaintiff was not privy. (Jenkins *v.* Cockerham, 1 Iredell, 309; and see Barfield *v.* Britt, 2 Jones' Law (N. Car.) 41.) And where defendant charged plaintiff with being a thief, a rogue and a swindler, and justified on the ground that plaintiff had bought goods of him, defendant, and resold them but had not paid defendant for them, held that defendant could not prove these facts, they not being known to the persons present when the charge was made. (Martin *v.* Loei, 2 Fost. & F. 654; and see Wakelin *v.* Morris, Id. 27.)

[4] Hotchkiss *v.* Oliphant, 2 Hill, 510. But hesitation, lurking insinuation, an attempted perversion of the import of the language of the first libel, or a substitution of one calumny for another, only aggravate the offense; and if the publisher, when advised of his error, hesitate to correct it, the case rises into a case of premeditated wrong, and he becomes a fit subject for exemplary punishment. (Id.) A subsequent

§ 414. The defendant may set up, in mitigation of damages, that he made the publication in a moment of heat and passion, induced by the immediately preceding acts of the plaintiff.[1] The defendant may, therefore, in mitigation, prove prior publications by the plaintiff of a provoking character.[2] Acts or publications of persons other than the plaintiff are not receivable in mitigation; as where the plaintiff's father, shortly before the uttering of the slander, used irritating language to the defendant,

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explanation and qualification of the slander is not competent evidence under a plea of justification. (Luthan *v.* Berry, 1 Port. 110; and see Alexander *v.* Harris, 6 Mumf. 465.) Defendant's subsequent assertions of the truth of the slander is not evidence of its truth. (Rice *v.* Withers, 9 Wend. 138.) As to the effect of a withdrawal, or recantation, see Larned *v.* Buffington, 3 Mass. 546; Brown *v.* Brown, 3 Ind. 518; Alderman *v.* French, 1 Pick. 19; Kent *v.* Bonzey, 38 Maine, (3 Heath), 435; Mapes *v.* Weeks, 4 Wend. 663; 6 & 7 Vict. ch. 96; 8 & 9 Vict. ch. 95. In Linney *v.* Matton, 13 Texas, 449, it was held that an immediate retraction of a charge made orally, and in the presence of all who heard the charge, was a defense to an action founded on such charge; and see Winchell *v.* Strong, 17 Ill. 597. Where one called another a rogue, in the hearing of bystanders, in a moment of irritation, and in reference to his unwillingness to settle a debt due him, and no injury resulted from the words, it was held not actionable. (Artieta *v.* Artieta, 15 La. An. 48.) In Alabama, retraction before suit, is, by statute, made mitigation; see Bradford *v.* Edwards, 32 Ala. 628.

[1] Dolevin *v.* Wilder, 34 How. Pra. Rep. 448. Defendant cannot set up any act or declaration of plaintiff's in mitigation unless such act or declaration formed part of the *res gesta*. (Richardson *v.* Northrup, 56 Barb. 105.) A defendant who would rely upon heat of passion in mitigation of damages, must set forth the acts and language of the plaintiff which he claims caused his passion. It is not sufficient to allege simply that he uttered the words in heat of passion caused by plaintiff. In slander, if the words were spoken through the heat of passion, or under excitement produced by the immediate provocation of the plaintiff, such excitement or passion may be shown in mitigation of damages; and in Iowa, without alleging them specifically in the answer. (McClintock *v.* Crick, 4 Iowa, 453; and see Steever *v.* Beehler, 1 Miles, 146; Brown *v.* Brooks, 3 Ind. 518; Larned *v.* Buffington, 3 Mass. 546; Mousler *v.* Harding, 33 Ind. 176.

The fact that the slanderous words were spoken in a sudden heat of passion, or under great provocation, should be considered by the jury in mitigation of damages. (Powers *v.* Presgroves, 38 Miss. 227; Ranger *v.* Goodrich, 17 Wis. 78; Duncan *v.* Brown, 5 B. Monr. 186; Traphagen *v.* Carpenter, 1 City Hall Reporter, 55; Else *v.* Ferris, Anthon, 23.)

[2] Thomas *v.* Dunaway, 30 Ill. 373; Wakley *v.* Johnson, 1 Ry. & Mo. 422. The defendant may, in mitigation, give evidence that the plaintiff has been in the practice of vilifying him, and that he was influenced to use the language with which he is charged by the abuse of the plaintiff, and that may be shown by the defendant's

held that that fact was inadmissible in mitigation.[1] Where, in an action for libel, the defendant sought to give in evidence libellous publications by the plaintiff of the defendant in newspapers and periodical works; held, that to make such admissible, it must be shown that they came to the knowledge of the party supposed to be provoked thereby, and that the court could not infer from the mere depositing newspapers in the defendant's name, as editor, at the stamp-office, under 38 Geo. III., c. 78, § 17, that they were published by, or came to the knowledge of, the defendant.[2]

§ 415. All the circumstances connected with the publication complained of should go to the jury;[3] and therefore, in an action for a libel, the defendant may give in evidence a former publication by the plaintiff, to which the libel was an answer, to explain the subject-matter, occasion and intent of the defendant's publication, and in mitigation of damages.[4] And a previous publication by the plaintiff, to which the alleged libel is an answer, is

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declaration. The jury is to determine whether the language which the defendant used was used because of such provocation received from the plaintiff. (Botelar *v.* Bell, 1 Md. 173.) The effect of parties publishing defamatory matter one against the other should be to give nominal damages only. (Pugh *v.* McCarty, 40 Geo. 444; Hibbs *v.* Wilkinson, 1 Fost. & F. 608 *ante*, p. 422, n. 3. As to provocation in mitigation, see Hackett *v.* Brown, 2 Heiskell (Tenn.) 264. But see cases in note 4, *infra*.

[1] Underhill *v.* Taylor, 2 Barb. 348.

[2] Watts *v.* Fraser, 2 Nev. & P. 157. Always, where mitigating circumstances are offered in evidence for the purpose of repelling the presumption of malice, it should be shown that the defendant knew of them at the time he made the charge. (Swift *v.* Dickerman, 31 Conn. 285; Dolevin *v.* Wilder, 34 How. Pra. Rep. 488; Reynolds *v.* Tucker, 6 Ohio, N. S. 516.)

[3] Cook *v.* Barkley, 1 Penn. N. J. Rep. 169.

[4] Hotchkiss *v.* Lathrop, 1 Johns. 286. A prior publication by plaintiff not admissible in justification. (Id.; Southwick *v.* Stevens, 10 Johns. 443.) Other libels alleged to have been published by the plaintiff of the defendant, not relating to the same subject, are not admissible in evidence, either in bar of the action or in mitigation of damages, both on the ground that the plaintiff had no notice of such defense, as well as of the inconvenience, by leading to a multiplicity of inquiries. (May *v.* Brown, 3 B. & Cr. 113; 4 D. & R. 670.) See Watts *v.* Fraser, 7 C. & P. 369; 1 Mo. & Rob. 449; note 1, *supra*.

admissible. The judge, before admitting or excluding it, may peruse it, in order to decide upon its character.[1] And all papers referred to in a libel may be admitted for the purpose of explanation and interpretation.[2] A postscript is admissible.[3] Prefixing a previous publication as a text to the libel complained of, does not *per se* make such previous publication admissible in evidence.[4]

§ 416. Controversies between the plaintiff and defendant prior to the publication complained of, and having no connection with the subject-matter of the publication, cannot be shown to mitigate the damages.[5] Nor are previous publications by the plaintiff concerning the defendant admissible in mitigation, unless so immediately preceding the publication by the defendant as fairly to raise the presumption that the defendant made the publication under the impulse of the provocation.[6] The defendant may show, in mitigation, that he was provoked to the publication complained of by some contemporaneous or nearly contemporaneous act or declaration of the plaintiff. Simply to show provoking acts or declarations by the plaintiff *prior* to the publication by the defendant, is not sufficient.[7]

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[1] Maynard *v.* Beardsley, 7 Wend. 560; 4 Wend. 336.

[2] Nash *v.* Benedict, 25 Wend. 645; Mullet *v.* Hulton, 4 Esp. 248.

[3] Coleman's Case, 2 City Hall Recorder, 49.

[4] Gould *v.* Weed, 12 Wend. 12. A subsequent publication cannot be given in evidence to determine the character of a publication, whether it is libellous or not. Two articles, to be so used, must appear simultaneously in the same paper or book. (Usher *v.* Severance, 2 App. 9.)

[5] Lester *v.* Wright, 2 Hill, 320. In an action of slander for words actionable in themselves, claiming general damages only; held, that, under the plea of the general issue, evidence that, during the six years prior to the trial, inveterate feelings of hostility had existed between the plaintiff and defendant, and that the plaintiff had taken every opportunity to irritate the defendant, was inadmissible. (Porter *v.* Henderson, 11 Mich. 20.)

[6] Maynard *v.* Beardsley, 7 Wend. 560; 4 *Id.* 336; Gould *v.* Weed, 12 *Id.* 12; Child *v.* Homer, 13 Pick. 503; Walker *v.* Winn, 8 Mass. 248. A question to a witness, as to the state of feeling between the parties, must refer to the time of the slanderous speaking. (Justice *v.* Kirlin, 17 Ind. 588.)

[7] Moore *v.* Clay, 24 Ala. 235; Watts *v.* Fraser, 2 Nev. & P. 157; 7 Ad. & El. 223; 1 Jurist, 671; 1 M. & Rob. 449; Moore *v.* Oastler, 1 M. & Rob. 451, n; Bourland *v.* Eidson, 8 Gratt. 27.

In an action for a libel, in which the plaintiff was charged with being "a degraded scoundrel, liar and blackguard," it was held that the defendant might be allowed to prove, under the general issue, in mitigation of damages, that the plaintiff, shortly prior to the publication of said libel, charged the defendant with false swearing in a cause in which he was a witness.[1] In an action of slander against husband and wife, for words spoken by the wife, it is not competent for the defendants to prove that circumstances relating to the plaintiff's conduct were communicated to the husband before the slanderous words were uttered.[2]

§ 417. The defendant cannot, to mitigate damages, give evidence of his poverty;[3] of his apparent good humor at the time of speaking the words;[4] that no one believed anything he said;[5] that the defendant was not the author of the slander, and that he named the author at the time of the publication;[6] that the publication did not in-

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[1] Davis *v.* Griffith, 4 Gill. & Johns. 342.

[2] Petrie *v.* Rose, 5 Watts & Serg. 364.

[3] Myers *v.* Malcolm, 6 Hill, 292; Palmer *v.* Haskins, 28 Barb. 90; and see cases cited, note p. 602, n. 4, *ante*.

[4] Weaver *v.* Hindreck, 30 Mis. (9 Jones), 502; see *ante*, p. 434, n. 3. Defendant being intoxicated at the time of publication, said to be a matter of mitigation (Howell *v.* Howell, 10 Ired. 84.)

[5] Howe *v.* Perry, 15 Pick. 506; *contra*, Gates *v.* Meredith, 7 Ind. 440. An imputation of theft, made in the presence of one witness only, who stated that he did not believe the charge, held no reason for restricting the damages to a nominal amount. (Markham *v.* Russell, 12 Allen, 573.) The fact that the words were spoken in the presence of one witness only, was held to be receivable in mitigation in Traphagen *v.* Carpenter, 1 City Hall Reporter, 55.

[6] Treat *v.* Browning, 4 Conn. 408; *contra*, Bennett *v.* Bennett, 6 C. & P. 588; Easterwood *v.* Quinn, 2 Brev. 64. But see *ante*, § 210. Under some circumstances, the defendant may prove, in mitigation, that he derived his information from others. (Kennedy *v.* Gregory, 1 Binn. 85; Galloway *v.* Courtney, 10 Rich. Law (S. Car.) 414; but see Thompson *v.* Bowers, 1 Doug. 321; Anthony *v.* Stephens, 1 Mis. 254.) And from whom or how he derived his information. (Leister *v.* Smith, 2 Root, 24); as that the charge was taken from the journals of Congress (Romayne *v.* Duane, 3 Wash. C. C. 246); or copied from another paper. (Davis *v.* Cutbush, 1 Fost. & Fin. 487.) That the defendant published the libel on the communication of a correspondent, held not admissible in mitigation. (Talbutt *v.* Clarke, 2 M. & Rob. 312.) Where A. pub-

jure,[1] or that it benefited the plaintiff;[2] or that others had previously published the same words;[3] a declaration of the plaintiff that the publication did him no injury;[4] or that he believed the defendant was not the author but only the repeater of the slander;[5] that plaintiff was an enemy of his (defendant's);[6] that plaintiff is a quarrelsome person;[7] or a malicious person;[8] that plaintiff had boasted of committing offenses of a like character with that charged;[9] that plaintiff was in the habit of abusing the defend-

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lished a libel taken from a paper published by B., as an extract from a paper published by C., it was *held*, in an action brought by C. against A., that the testimony of D. that he had heard A., before he published the libel, ask E. whether he had not seen it in the paper of C., and that E. answered "that he had," was inadmissible in mitigation of damages; but that E. himself should be produced, if his declaration were proper evidence. (Coleman *v.* Southwick, 9 Johns. 45.) In an action for the publication of a libel, the defendant asked a news collector, who wrote a part of the article complained of, "What inquiries and examinations he made, and what sources of information he applied to, before making the communication" which tended to charge the plaintiff with dishonesty and bad faith? Held, that the question was incompetent, and that the defendant, as a foundation for such question, could not prove that there was a general anxiety in the community in regard to the facts stated in the publication. (Sheckell *v.* Jackson, 10 Cush. (Mass.) 25.) And see Bond *v.* Kendall, 36 Verm. 741, where it was held that the defendant could not show the libel was a letter to B. containing the result of inquiries made concerning the plaintiff at request of B.

[1] Titus *v.* Sumner, 44 N. Y. 266. On the trial of an action for slander it is not error to exclude a general offer by defendant to prove that plaintiff's reputation was not affected by the publication. The evidence would be a mere opinion of the witness, and is not directed to the plaintiff's want of previous good character as affecting the amount of the recovery. (*Id.*)

[2] Calhoun *v.* M'Means, 1 N. & M. 422; Rex *v.* Woodfall, Lofft, 776. No man shall set up his own iniquity as a defense any more than as a cause of action. (Mansfield, Ch. J., Montefiori *v.* Montefiori, 1 W. Black. 363; see Stewart *v.* Wilkinson, 7 Law Times, 81, Fry *v.* Bennett, 28 N. Y. 328.

[3] Saunders *v.* Mills, 6 Bing. 213, *ante.*

[4] Porter *v.* Henderson, 11 Mich. 20. In Quigley *v.* Phila. &c. R. R. Co. (21 How. U. S. Rep. 209), the defendants gave evidence of declarations by the plaintiff that the matters out of which the libel arose had improved his business. See Ostrom *v.* Calkins, 5 Wend. 263; and *ante*, note 9, p. 489.

[5] Evans *v.* Smith, 5 Monr. 363.

[6] Craig *v.* Catlet, 5 Dana, 325.

[7] Hosley *v.* Brooks, 20 Ill. 115; M'Alexander *v.* Harris, 6 Mumf. 465.

[8] Forshee *v.* Abrams, 2 Clarke (Iowa), 572.

[9] Pallet *v.* Sargent, 36 N. Hamp. 496.

ant;[1] that plaintiff was a common libeller;[2] that plaintiff has sometimes published slander of other persons not the defendant;[3] or has threatened so to do;[4] a former recovery;[5] that defendant declared he could prove the truth of the words;[6] or in an action for slander of husband and wife, that they lived unhappily together;[7] or kept a disordely house.[8]

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[1] Goodbread *v.* Leadbitter, 1 Dev. & Bat. 12; Wakley *v.* Johnson, 1 Ry. & M. 422; May *v.* Brown, 3 B. & Cr. 113; M'Alexander *v.* Harris, 6 Mumf. 465; *contra*, see Botelar *v.* Bell, 1 Md. 173. In a suit for slander, for charging the plaintiff with perjury, the defendant cannot show that, upon a wholly different occasion, the plaintiff called him a liar and a perjured wretch. (Porter *v.* Henderson, 11 Mich. 20.)

[2] Maynard *v.* Beardsley, 7 Wend. 560; 4 *Id.* 336; Gould *v.* Weed, 12 *Id.* 12.

[3] Forshee *v.* Abrams, 2 Clarke (Iowa) 571.

[4] Cochran *v.* Butterfield, 18 N. Hamp. 115.

[5] The defendant is not allowed to give in evidence, in mitigation of damages, a former recovery of damages against him, in favor of the same plaintiff, in another action for a libel, which formed one of a series of numbers published in the same gazette, and containing the libellous words charged in the declaration in the second suit. (Tillotson *v.* Cheetham, 3 Johns. 56.) The damages are not to be lessened by the fact that the plaintiff has an action against other persons for publishing the same language. (Harrison *v.* Pearce, 1 Fost. & F. 567; Frescoe *v.* May, 2 *Id.* 123.)

[6] James *v.* Clarke, 1 Iredell, 397.

[7] *Anon.*, 1 Hill (S. Car.) 251.

[8] Watson *v.* Moore, 2 Cush. 133.

APPENDIX.

APPENDIX.

King's Bench, A. D., 1821.

SWADLING *v.* TARPLEY.

Where a servant brings an action for an alleged false character given of him by his late master, the latter is in general privileged, and to sustain the action, *malice* must be proved, but this may be inferred by the jury from the language used and the circumstances under which the defamatory character is given.

This was an action for a libel: the defendant pleaded, 1. The general issue, *not guilty;* and 2. A justification of the truth of the alleged libel, on which issue was joined. At the trial before Garrow, B., at the last assizes for the county of Oxford, a verdict was found for the plaintiff, damages £50.

The case was this:—The plaintiff had been a nursery maid for four years in the family of the defendant, a magistrate and clergyman, residing in the county of Northampton; three months after she quitted the service, a lady, to whom she had hired herself, wrote to the defendant's wife for the plaintiff's character, wishing to know whether she had been found honest, sober, and steady, and equal to undertake plain cooking? To this letter the defendant sent an answer to the following effect:

Madam,—

Mrs. Tarpley being unwell, she has requested me to answer your letter. *Susan Swadling* lived as nursery maid in my family for more than four years; and I think it my duty to inform you that she is neither honest, sober, nor steady, and that she was turned away for the most gross and improper misconduct. She is a most wicked and profligate woman. It is impossible for me to describe the gross insolence and ingratitude shown by her to *Mrs. Tarpley* and myself. We have undoubted proof of her going to the man-servant's bed many nights for months before she left us. One servant who lived with us for many years has left us on her account. I am glad of an opportunity of exposing this woman's character. A more vile wretch does not exist; I know her to be a liar, a great thief, and insolent beyond bearing. She

has been guilty of a criminal intrigue with the man-servant, David S———. I wish you to read this letter to her should you see her, and I warn you upon no account to take her into your service. I am, &c.

On the part of the plaintiff, the man-servant alluded to in the letter, and mentioned as the person with whom she had had an improper intercourse, was examined, and he positively denied that any such intercourse had ever taken place between them; and he further said, that she was a modest, discreet, and well-behaved young woman. He admitted that she had been dismissed for insolence; but, on his cross-examination, nothing came out to shake his testimony. On the part of the defendant, evidence was offered in support of the justification pleaded. It was proved by other servants in the family, that during the six months previous to her being turned away, after the family had gone to bed, she had several times left her own bed-room and gone to that of the man-servant; that she was watched, and next morning seen to come out of his room; that on one occasion one of the servants being disturbed by the crying of a child, she went in the plaintiff's room and found her absent from her bed; and the child continuing to cry, she was seen to return to her own room from that of the man-servant's, in her night-gown, and appeared to the witness to be extremely confused. Upon this part of the case expressions of strong affection for the man were proved to have been uttered by her repeatedly, and going, to a certain extent, to an admission of a criminal *amour* subsisting between them. In addition to this, evidence was offered affecting her character for honesty. It was proved that she had stolen coffee and sugar, the property of her master; and one witness deposed to her having stolen a pair of shoes. Other evidence was offered tending to show that she was a person of depraved habits. On the part of the defendant it was contended, 1. That the letter in question was privileged; 2. That there should have been evidence of express malice to render it actionable; and 3. That the weight of evidence was in favor of the defendant, and substantially justified him in writing such a letter. The learned judge summed up the whole of the case for the jury, and left it for them to say whether there was anything upon the face of the libel to warrant the conclusion, that the defendant was influenced by malicious motives. If they were satisfied that the defendant was actuated by malicious motives, the

plaintiff was entitled to a verdict, notwithstanding the privilege which the law threw around a master in giving the character of a servant; and notwithstanding there were some circumstances in the case which, to a certain extent, would justify a strong expression of opinion concerning the plaintiff's character and conduct. The jury found their verdict for the plaintiff, damages £50.

G. Cross now moved for a rule to show cause why the verdict should not be set aside and a new trial granted. He made two points; 1. That to sustain this action there must be evidence of express malice, for that such a letter is privileged when written honestly, though with heat and intemperance; and 2d. That the verdict was against the weight of evidence. He insisted that there was nothing in proof to show that the defendant was influenced by malicious motives; on the contrary, all the evidence went to show that he was justified in what he had written. Undoubtedly the letter was a very strong one; but in such cases as this the court would not too nicely scan the language of a master in giving the character of a servant who certainly had been guilty of such conduct as that proved in evidence. The interests of society required that an unrestrained communication should be allowed in such cases; and a little unguarded warmth, proceeding from an improper motive, should not itself be a sufficient foundation for an action, supposing the defendant had gone a little too far, and had given the plaintiff a character which, strictly speaking, was unmerited, still, considering the privilege which the law gave a master, ought not to be broken in upon, when, by so doing, the most mischievous consequences to society must ensue. The jury were not at liberty from the mere libel itself to infer that the defendant was influenced by malice, because upon that subject some express and positive evidence should have been given. It must be admitted that the case had fairly gone to the jury, including this proposition, that they were to consider whether the defendant, at the time he wrote the letter, had reason to believe that the facts which he stated were true. He referred to Edmonson *v.* Stephenson, Bull. N. P. 8; it was there said, that where words are spoken in confidence, and without malice, no action lies; therefore, where A, a servant, brought an action against her former mistress, for saying to a lady, who came to inquire for the plaintiff's character, that she was saucy and impertinent, and often lay out of her own bed, but was a clean girl, and could do her work well; though the plaintiff

proved that she was by this means prevented from getting a place, yet Lord Mansfield held that this was not to be considered as an action in the common way, for defamation by words, but that the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved; that it was a confidential declaration, and ought not to have been disclosed. But if, without ground, and purely to defame, a false character should be given, it would be a proper ground for an action. In Weatherstone *v.* Hawkins, 1 T. R. 110, it was also held that a servant cannot maintain an action against his former master for words spoken, or a letter written by him, in giving a character of the servant, unless the latter prove the *malice* as well as the *falsehood* of the charge, even though the master make specific charges of fraud; he also referred to Rogers *v.* Clifton, 3 Bos. & Pul. 587, and on the authority of these cases, coupled with a review of all the circumstances, he contended that the defendant was entitled to a new trial.

Abbott, C. J.—I am of opinion that in this case there ought to be no rule granted. I should be sorry that any decision in which I took part, should have the effect of breaking down or lessening that which I consider to be a very wholesome rule of law, namely, that a character written by a former master to a person instituting an inquiry, with a view to take a dismissed servant into his service, is to be considered as a privileged communication, unless it can be shown in some way that the statement of such character proceeds from a vindictive motive. The master in such cases is privileged in what he does; and, in my mind, it is of the utmost importance to society that he should be so privileged. The error is too often committed on the other side; persons are more apt to conceal the faults of servants, in order that they may not be deprived of another service, than to enlarge and expatiate upon their misconduct in a manner that might be justifiable. If, upon reading this letter, a judge could take upon himself to say that it bore nothing upon the face of it manifesting a vindictive motive, I should think he would have been bound to tell the jury that it was a privileged communication, and upon the general issue they ought to have found a verdict for the defendant. But I cannot say, upon reading this letter, that I do not see upon the face of it something leading me to suppose there was an improper motive in the mind of the defendant; and if the contents of the

letter were such as to make it a point in any reasonable degree doubtful, then that doubt must be submitted as a question of fact to the jury; it must be for them to say, upon the view of the whole case, whether this letter did proceed from vindictive motives, or was founded in that correct and proper motive which the law permits. I think this letter does contain such expressions as were fit for the consideration of the jury upon the question of malice, and the question was so presented to the jury. It was left to them to say, upon the whole of the case, whether or no they thought the defendant was actuated by malicious motives at the time. They have, upon the view of the whole of the evidence, found that he was influenced by such motives; and the credit due to the witnesses was a matter peculiarly for their consideration, and I cannot say that that they have come to a wrong conclusion. We are not to take it for granted that the question was not fitly left to them as a question for their consideration. I am of opinion, therefore, that we ought not to disturb this verdict.

Bayley, J.—It appears to me that this question was most properly left to the jury. The point upon the general issue was, whether, at the time the letter was written, there was malice in the mind of the defendant in writing it. He is fully warranted in giving an answer to the questions which are put to him; and, in a temperate manner, stating everything which may have a fair tendency to enable the person to whom the letter is written to exercise a discreet judgment upon the subject. But looking at this letter, it appears to me there is a degree of heat and warmth and particularity in it, which was not called for by the application made for the character of the plaintiff; and that being left for the consideration of the jury, it appears to me to have been the proper point for their determination on the general issue. Upon the other question, whether the facts were true or not, that would depend upon the credit given by the jury to the witnesses. There was conflicting evidence on the one side and the other; there was the evidence of the man-servant, on the one hand; and they had the opportunity of hearing his testimony, and seeing the manner in which it was delivered. There were several witnesses certainly on the part of the defendant, and after hearing their testimony, the jury had an opportunity of seeing on which side the balance of truth lay. If it had been suggested to us that

the learned judge had been dissatisfied with the conclusion to which the jury came, it would have been right for us to have made some application to him upon the subject; but I do not find that anything of that kind is suggested. Not knowing that there is any dissatisfaction in the mind of the learned judge, we cannot act upon the notion that there is any such dissatisfaction existing.

Holroyd, J.—In cases of this kind, the proof certainly lies upon the party bringing the action, where the alleged slander, whether by words or in a letter, proceeds in consequence of an application to a master for the character of a dismissed servant, to show that there was malice in the mind of the defendant, either by direct evidence, or by some other circumstances from which malice can be collected. In the absence of such proof, the defendant would be either entitled to a verdict or the plaintiff must be nonsuited. If that were the case in the present action the defendant would be entitled to succeed, and the court would grant a new trial. But the letter in this case contained such matter as was sufficient to be left to the jury to say whether the defendant was influenced by malicious motives; and they having drawn a conclusion which appears to me to have been perfectly right, I think we aught not to disturb their verdict.

Best, J.—I am of the same opinion. This motion is made on two grounds: first, that this letter is privileged; and, second, that the verdict is against the weight of the evidence in the cause. There is no doubt that if a man gives a character of a servant, it is *prima facie* privileged, and the party injured must go on to show that the character was given from motives of malice. The learned judge at the trial very fairly left it to the jury to consider whether this letter was written with a malicious intention. He also left the whole of the evidence for their consideration. The letter itself imported sufficient matter to raise the question of malice or no malice, in this respect the case of Rogers *v.* Clifton is in point. No doubt the defendant, as a clergyman and a magistrate, might be very justly incensed at the proceedings of the plaintiff in the bosom of his own family; but if he exceeded the bounds of discretion in the expression of his opinion, he must be answerable for the consequences.

Rule refused.

King's Bench, A. D., 1822.

KING *v.* TOWNSEND.

A voluntary affidavit made before a justice of the peace, is not a judicial proceeding, and therefore if such an affidavit contains libellous matter, it is actionable.

To describe a man as an informer in such a publication is libellous.

Where special damages was laid, in that A. B. had *wholly ceased to deal with the plaintiff*, by reason of the libel complained of, and it was proved only that she had not dealt with him to so great an extent as before: *Held*, that this was sufficient evidence of special damage to sustain the declaration.

Action for a libel contained in an affidavit voluntarily made by the defendant, before a magistrate, imputing to the plaintiff that he had given information to the commissioners of customs, that one *Decima Barber*, a milliner, was possessed of certain uncustomed goods, which were in fact seized, whereby the plaintiff, who carried on the business of a silk mercer, sustained special damage, by reason that the said *Decima Barber wholly ceased to deal* with the said plaintiff in consequence of such slander. Plea, *not guilty*, and issue joined.

After proof was given of the publication of the libel, Mrs. *Decima Barber* was called to prove the special damage. She deposed that previous to the publication of this libel she had dealt almost entirely with the plaintiff, for such articles of silk as she required in her business; but that since the publication, believing that the plaintiff had been the person who caused information to be given against her to the Customs, she had ceased to deal with him to so large an extent as formerly. She still dealt with him, but not so largely as before the publication.

Chitty, for the defendant, took three objections to the plaintiff's right to maintain this action: 1. This alleged libel, being in the form of an affidavit sworn before a justice of the peace, it must be considered as a judicial proceeding, and therefore not the subject of an action for libel (4 Co. 14, and 1 Saunders, 132). 2. Supposing it not to be a judicial proceeding, still, as it only imputed to the plaintiff that he was an informer, that is not libellous; for, however obnoxious the character of an informer may be, yet it is the duty of every good subject to put the law in force, by giving such information as may bring offenders to punishment; and therefore it is not libellous to call a man an informer. And, 3. The allegation of special damage in this de-

claration is not made out. The averment is, that by reason of this libel, Mrs. *Decima Barber* wholly ceased to deal with the plaintiff. Now, that is not so; for she still continued to deal with him, though not to the same extent as formerly; and therefore this averment is not sustained if she dealt with him for anything.

Abbott, C. J.—I am of opinion that this action is maintainable. *First*, I think this affidavit is not a judicial proceeding, for it is the mere voluntary affidavit of the defendant; and if such an affidavit were to be considered as a judicial proceeding, and therefore privileged, it would afford a very easy recipe for a libeller to traduce the characters of the most innocent persons. *Second*, I think that to designate a man as an informer, in a publication like this, if done maliciously (which is for the jury), it is libellous in a very offensive degree, and may be the subject of an action. And, *Third*, I have no doubt that proof of Mrs. *Decima Barber* having ceased to deal with the plaintiff to any extent, *in consequence* of the publication of this libel, will be sufficient proof of special damage to sustain this declaration; and it is for the jury to say what damages they will give under the circumstances of the case.

The jury found for the plaintiff, damages £20.

Chitty, in Hilary term, moved to arrest the judgment on the same ground, but the court refused the rule.

Sittings in Middlesex, A. D., 1822.

FOOTE *v.* ROWLEY.

Declaration for words imputing that the plaintiff had murdered his *infant daughter*, means his *legitimate daughter*, and it appearing that the daughter of and concerning whom the words were spoken was an *illegitimate* child of the plaintiff: *Held*, that the declaration was ill.

Sed qu. As the words were spoken by an apothecary who had attended the child in the small-pox, were they actionable, it not appearing that they were meant in a criminal sense?

This was an action for defamatory words, imputing to the plaintiff that he had murdered his infant daughter. Plea, *not*

guilty, and issue thereon. The words set out were, "You have murdered your little girl." "This child is murdered." "He has murdered his daughter."

The plaintiff had lost his child in the small-pox; the defendant, a surgeon and apothecary, had attended the child during her illness, and it was alleged that the defendant had said of the plaintiff, of and concerning the child, *that he had murdered his daughter, &c.* It appeared in evidence that the daughter was not born in wedlock, although the plaintiff was a married man. The declaration described the child generally as being "*the infant daughter of the said plaintiff.*"

Scarlett, for the defendant, objected that the plaintiff must be nonsuited. The child was stated in the declaration to be the infant *daughter* of the plaintiff; now the presumption of law was that the child was born in wedlock; but the fact was otherwise, and that fact should have been stated in the declaration. Supposing the words themselves were actionable, the illegitimacy of the daughter would have been no objection; but the illegitimacy ought to have been averred.

Gurney and *Long*, *contra*, endeavored to answer the objection, *sed per.*

Abbott, C. J.—This is a fatal objection. The fact of the illegitimacy ought to have been stated. In the declaration the child is described as the plaintiff's infant daughter; now that imports his legitimate daughter, but the fact is not so. The words might have been set out with a *colloquium* of and concerning "a certain *illegitimate child* of the said plaintiff." There must therefore be a nonsuit. But I do not intimate that the plaintiff may bring another action, and avoid this objection; for then the question would be, in what sense these words were used? Unless they were used by the defendant in a criminal sense, they would not be actionable.

Nonsuited.

King's Bench, A. D., 1822.

MARTINERE *v.* MACKAY ET UX.

Saying of the plaintiff and one P. S., "I dare say they have got some of the silver spoons in their pockets," is not actionable without an innuendo showing that the words import a felonious stealing.

Where some counts in a declaration are good and some bad in law, and general damages are given, the court will arrest the judgment *in toto*. *Sed quære*, whether a *venire de novo* may not be awarded on payment of costs.

This was an action for words of slander, imputing to the plaintiff that she had been guilty of theft. The declaration contained a great many counts. At the trial before Holroyd, J., at the Westminster sittings after last Trinity term, A. D. 1822, a verdict was found for the plaintiff on the whole declaration, with £50 damages. In Michaelmas term a rule *nisi* was obtained for arresting the judgment, on the ground that the eleventh count did not allege any actional words, and the damages found by the jury being on the whole declaration, the judgment could not be entered up.

Platt now showed cause against the rule. The objection arises upon the eleventh count, on the ground that there is no innuendo to give the words there set out an actionable sense. The plaintiff had been a servant in the family of the defendant, and the defamatory words declared upon were used by the defendant's wife, of and concerning the plaintiff, in giving her a character to a new mistress. In order to support the eleventh count, the plaintiff is at liberty to pray in aid the introductory averment in the first count; that averment is this: "The defendant *Jane*, contriving and intending to injure the plaintiff in her good name and credit, and to bring her into great scandal, and to cause it to be suspected and believed that she was a thief, and a person liable and subject to the pains and penalties inflicted upon persons convicted of robbery and theft, falsely and maliciously spoke of and concerning the plaintiff and one P. S. the following false, malicious, and defamatory words:" The words set out in the eleventh count are these: "*I dare say they have got some of the silver spoons in their pockets.*" Now the question is, whether these words are actionable without an innuendo, giving them a point and meaning, having a slanderous import. Standing by themselves, perhaps, that cannot be contended, but when coupled with the averment in the first count, they are sufficient to support the judgment. By this means they are clearly actionable. He referred to Collier *v.* Galliard, 2 W. Bl. 1062, and Peake *v.* Oldham, Cowp. 275. Supposing, however, that this count is bad, and that the judgment ought to be arrested, the court will award the plaintiff a *venire facias de novo*, to assess the damages upon

the other counts of the declaration, which are clearly good; or the verdict may be amended by the judge's notes, and entered up on the good counts. He referred to Auger *v.* Wilkins, Barnes, 478; Smith *v.* Hayward, *Id.* 480; Eddowes *v.* Hopkins, Dougl. 377; and Grant *v.* Astle, *Id.* 722.

Tindal, contra. This count is clearly bad, and as the verdict is taken on all the counts, the judgment must be arrested *in toto.* The words set out are perfectly innocent, and cannot, by any construction, have an actionable sense without an innuendo giving them a mischievous meaning. The plaintiff might have the spoons in her pocket for the most innocent purpose, and not with a felonious design of stealing them. She might put them there to take care of—to carry them to the silversmith—or for any other purpose quite foreign from an intention of thieving; and, therefore, to give them an improper sense, there should have been an innuendo. It is impossible to pray in aid the averment in the first count, and couple it with the eleventh, in order to dispense with the necessity of an innuendo. The eleventh count must be perfect in itself, and cannot be helped by another count free from objection. If, then, one count is bad, the judgment must be arrested *in toto*, and the court cannot award a *venire de novo.* The verdict here is taken on the whole declaration, and it is impossible to say on which count the jury would assess the damages; for the damages may be compounded of all the counts, the good and the bad. Suppose there should be a second jury, how can they be compelled to give only £50 upon the good counts? They may take it into their heads to give £500, and consequently the defendant may sustain a prejudice to which he ought not to be exposed. Besides, the plaintiff will derive no advantage from a *venire de novo*, for as the proceedings must be on the record, there will be manifest error, and therefore there must be a great deal of unnecessary expense incurred. The case of Holt *v.* Scholefield, 6 T. R. 691, is an authority upon this case; for there it was held that where some counts in a declaration are good and some bad in law, and general damages are given, the court will arrest the judgment *in toto*, and will not award a *venire de novo.*

Abbott, C. J.—I am clearly of opinion that the eleventh count of this declaration is bad, and that the judgment must be arrested. It cannot be said, that because there is a general allegation in the first count, "*that the defendant maliciously intending to have it*

believed that the plaintiff was a thief," that will make words afterwards introduced into other counts actionable, which are not actionable of themselves; or can be prayed in aid of other counts which are clearly defective. The words themselves must reasonably import a charge concerning some matter or thing which will subject the party accused to punishment. I cannot say that these words convey an allegation that the spoons had been stolen by the plaintiff. The allegation is that the defendant, speaking of certain spoons belonging to her, said, "I dare say the plaintiff has some of them in her pocket." Now, she might have them in her pocket consistently with perfect innocence; and it is impossible to say that these words of themselves are actionable. Then as to the *venire de novo*, I am not clear that we can grant such an application as a matter of course. If it is granted, it must be on payment of costs, and the plaintiff will consider whether she will take a *venire* subject to such conditions, and liable to the consequences which may possibly follow upon a writ of error.

Bayley, J.—I am of opinion that this judgment must be arrested. My difficulty in awarding a *venire de novo* is, that it may be error on the record, and that would be subjecting the plaintiff to a great deal of unnecessary expense. Besides, I do not see how a new jury are to be restrained in giving damages upon the other counts beyond what the former jury have given, and that would be exposing the defendant to consequences which the justice of the case may not require.

The rest of the court concurred in the same opinion.

Rule absolute for arresting the judgment.

Additional Note to Page 137, *ante*.

A court of probate has, it seems, power to order the omission from the registry of a will of any defamatory or offensive matter contained in such will. (*Re* Honywood, Law Rep. II, Prob. & Div. 251; *Re* Wartnaby, 1 Rob. Ecc. 423; Curtis *v.* Curtis, 3 Add. 33; Marsh *v.* Marsh, 1 Sw. & Tr. 528.)

Additional Note to Page 499, *ante*.

By 20 & 21 Vict., ch. 85, a woman judicially separated from her husband, is considered a *femme sole* for the purposes of contract, wrongs and injuries, and suing and being sued in civil proceedings; and her husband is not liable for her contract or wrongful act or omission.

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